



Family Life and Employment of Immigrant Women in the European Legal Space

Gender Bias of Legal Norms and the Transformative Potential of Fundamental Rights

Fulvia Staiano

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 20 October 2014

European University Institute
Department of Law

Family Life and Employment of Immigrant Women in the European
Legal Space
Gender Bias of Legal Norms and the Transformative Potential of
Fundamental Rights

Fulvia Staiano

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Prof. Ruth Rubio Marín, European University Institute (Supervisor)
Prof. Bruno De Witte, Maastricht University and European University Institute
Prof. Massimo Iovane, Università degli Studi di Napoli Federico II
Prof. Siobhán Mullally, University College Cork

© Fulvia Staiano

No part of this thesis may be copied, reproduced or transmitted without prior
permission of the author

This thesis has been submitted for language correction.

Summary

This thesis starts from the consideration that law, mainly but not exclusively immigration law, can disproportionally and negatively affect immigrant women's enjoyment of their rights in conditions of equality with both immigrant men and citizen women. These perverse effects are equally evident in the fields of family life and in that of employment. In the light of this observation, the aim of this thesis is twofold. On the one hand, it seeks to verify the presence of such gendered shortcomings in apparently neutral norms applicable to immigrant women in the European legal space, both at European and domestic level. On the other hand, and most importantly, it aims to verify the transformative potential of human and fundamental rights law in this area, exploring the beneficial effects as well as the defects of this source *per se* and in its judicial application *vis-à-vis* biased norms applicable to immigrant women.

In order to pursue this objective, this thesis explores three different levels of protection and enforcement of immigrant women's human and fundamental rights in the European legal space. Chapter 1 is devoted to the human rights framework established by the Council of Europe, with a special focus on the European Convention on Human Rights. Chapter 2 discusses European fundamental rights law, with main reference to the Charter of Fundamental Rights and Freedoms of the European Union. In Chapters 3 and 4 the national case studies of Italy and Spain will be analysed respectively, with reference to the multi-level system of fundamental rights protection in force in their legal orders.

INDEX

ACKNOWLEDGMENTS

INTRODUCTION

CHAPTER ONE. European Human Rights Law: A Common Standard of Protection for Immigrant Women's Enjoyment of Family Life and Employment?

Introduction

1. European Human Rights Law: Relevant Provisions for Immigrant Women in the Fields of Family Life and Employment

2. Immigrant Women and Family Life: Gendered Shortcomings of National Immigration Laws and Practices in the Light of the European Convention on Human Rights

2.1. Immigrant Women's Access to Family Reunification Before the European Court of Human Rights

- a. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*: An Example of the Positive Influence of Human Rights on Biased Norms of Family Migration Law
- b. *Haydarie v. the Netherlands*: When Human Rights Fail to Correct the Gender Bias of Family Migration Law
- c. Transnational Mothers' Access to Family Reunification With Their Children: the Dangerous Endorsement by the Strasbourg Court of a Gendered "Good Mother" Narrative
- d. Legal Enforcement of Gendered Models and its Disparate Impact on Immigrant Women

2.2. Freedom from Domestic Violence under the European Convention: Towards Common Standards for National Migration Regimes?

- a. The European Court of Human Rights' Case Law on Domestic Violence: Extracting Relevant Principles from Multiple Human Rights Under the Convention
- b. Potential Application of the Strasbourg Court's Case Law on Domestic Violence to Immigrant Women in the Context of Family Reunification Regimes

3. Immigrant Women and Employment: Access to European Human Rights for Immigrant Women Workers

3.1. Immigrant Women's Freedom from Labour Exploitation in the Light of the Prohibition of Slavery, Servitude and Forced Labour Under Article 4 ECHR

- a. "Artiste" Residence and Work Permits as a Trigger for Exploitation and Trafficking: the Cypriot Case Before the European Court of Human Rights
- b. Exploitation of Immigrant Women in Domestic Work: Cues for Reflection from the Strasbourg Court's Case Law

3.2. Immigrant Women Workers' Possibilities to Change Employers or Employment in the Light of Article 18 of the European Social Charter

4. Concluding Remarks

CHAPTER TWO. European Fundamental Rights: A Remedy to the Gender Bias of EU Immigration Law?

Introduction

1. European Fundamental Rights in the Field of Work and Family: Significance for Immigrant Women in the European Legal Space

- a. Right to Family Life
- b. Right to Work

2. European Family Migration Law in the Light of Immigrant Women's Fundamental Right to Family Life

- a. Access to Family Reunification
- b. Enjoyment of Spousal Equality and Equality Within the Family

3. European Law and Immigrant Women Workers' Fundamental Rights

- a. A Gendered Assessment of Key European Union Law Provisions in the Light of Immigrant Women's Fundamental Right to Engage in Work
- b. Access to Employment in Conditions of Non-Discrimination Before the European Court of Justice: Some Reflections on Selected Judgments

4. Concluding Remarks

CHAPTER 3. The Italian Case: Immigrant Women in Italy and Their Fundamental Rights in the Fields of Family and Employment

Introduction

1. Fundamental Rights in the Italian Legal System

2. Immigrant Women's Fundamental Right to Family Life: Problematic Provisions of Italian Law

- a. Access to Family Reunification Versus Income Requirements Imposed by Italian Law in the Light of Migrant Women's Constitutional Rights
- b. Protection during Pregnancy and Maternity: Special Permits "for Medical Reasons" in the Light of Migrant Women's Constitutional Right to Family Life
- c. Immigrant Women's Freedom from Domestic Violence: Influence of Fundamental Rights on Italian Courts
- d. Overall Influence of Italian Fundamental Rights Law on Immigrant Women's Enjoyment of Family Life

3. Immigrant Women's Fundamental Rights in the Field of Employment: Problematic Provisions of Italian Law

- a. Immigrant Women's Freedom from Exploitation and Abuse Versus Links With Employers Established by Italian Law
- b. Links With Employers in Residence Permits for Entertainers: Observations for a Future Analysis in a Fundamental Rights Perspective
- c. Discrimination Against Immigrant Women in Access to Employment: Does the Italian Anti-Discrimination Regime Live up to Fundamental Rights Standards?
- d. Overall Influence of Italian Fundamental Rights Law on Immigrant Women's Enjoyment of Workers' Rights

4. Concluding Remarks

CHAPTER 4. The Spanish Case: Immigrant Women in Spain and Their Fundamental Rights In the Fields of Family and Employment

Introduction

1. Foreigners' Fundamental Rights in the Spanish Legal Order

2. Spanish Immigration Law: an Overview

3. Immigrant Women's Fundamental Right to Family Life: Problematic Provisions of Spanish Law

- a. From the Exception to the Rule: Immigrant Mothers' Access to Residence Rights on the Grounds of Childcare
- b. Immigrant Women Versus Income-Based Rules on Sponsorship of Family Reunification
- c. Immigrant Women and Freedom from Domestic Violence
 - I. Spanish Rules on Immigrant Women's Freedom from Domestic Violence: A Gendered Analysis in a Comparative Perspective
 - II. Influence of Fundamental Rights Law on the Denial of Residence Rights to Perpetrators of Domestic Violence
- d. Overall Influence of Spanish Fundamental Rights Law on Immigrant Women's Enjoyment of Family Life

4. Immigrant Women's Fundamental Rights in the Field of Employment: Problematic Provisions of Spanish Law

- a. Immigrant Women's Residential Stability and Legal Requirements Based on Continuous Work or Active Search for Employment
- b. Discrimination Against Immigrant Women Workers and Access to Justice
 - I. Protection Against Workplace Discrimination
 - II. Access to Justice for Migrant Domestic Workers in Private Households
- c. Overall Influence of Spanish Fundamental Rights Law on Immigrant Women's Enjoyment of Workers' Rights

5. Concluding Remarks

CONCLUSIONS

Acknowledgments

Working on this thesis was an enormous privilege and pleasure thanks to the contributions of many different people who greatly enriched my academic as well as personal life.

I am deeply grateful to my supervisor, Prof. Ruth Rubio Marín, who shared my enthusiasm for the topic of gender and migration from the very beginning. Through her invaluable academic guidance, Prof. Rubio Marín allowed me to give a tangible shape to my ideas and to navigate this complicated field without losing sight of my final aim. I also thank Prof. Massimo Iovane, who followed my first approaches to international migration law when I was preparing my graduate thesis with the highest professionalism and warmly encouraged me to pursue my research interests in further directions. In my formative years, an important role was played by Prof. Maria Luisa Zampella, who taught me never to be afraid to step out of my comfort zone and that constructive criticism inevitably makes people better researchers. I also sincerely thank Francesca Nicodemi and Salvatore Fachile for finding the time to exchange ideas with me on the Italian case study, despite their busy schedules as lawyers.

On a personal note, the kind of researcher that I strive to become has been inspired by my father, Sandro, who taught me about the importance and the value of working hard towards my objectives, and by my mother, Enrica, who lovingly encouraged me to learn English since I was a child and who sparked my passion for travel and thus my curiosity for the wider world. I was also lucky to share a lot of laughter, and some struggles, with my sister Francesca.

My friends Luigi, Salvo, Davide, Nadia, Paola, Ileana and Berenika have been incredibly helpful throughout these four years in many different ways, and I thank them for everything. A special thanks goes to my partner Gerardo, who has welcomed my Ph.D. as a beautiful adventure and who has given me unrelenting support and encouragement, making me start every working day with a smile on my face and renovated energy.

Last but not least, I was able to carry out the research for this thesis in the best possible conditions thanks to the excellent work of the EUI's library and administrative staff. Their efforts to create a positive and efficient working environment for researchers make the EUI a truly special place, of which I feel lucky to have been a part.

INTRODUCTION

At present, immigrant women account for a significant proportion of the migration fluxes towards Europe. According to the UN Organisation for Economic Co-operation and Development, in 2013 the highest proportion of female migrants in the world was to be found in Europe (51.9%)¹. In addition to representing a significant part of the total number of third-country nationals living in the Union territory, immigrant women² experience specific difficulties and issues in many different aspects of their lives in their host countries, involving both the family and the employment realms.

Despite the fact that immigrant women are increasingly migrating alone, this category still dominates family migration³ and is thus particularly affected by any provision in this field. While the percentage of immigrant women entering the European territory for work reasons has increased significantly since the late 1980s – from 18% to 32% according to Eurostat⁴, family reasons are still the main motivation for the immigration of third-country national women to Europe.

The high concentration of immigrant women in family migration fluxes prompts the observation that the dependent status from sponsors that inevitably comes with this type of migration disproportionally impacts this category. At the time of their first entry in the host country, family migrants are likely to be reliant on their sponsoring family member in order to

¹ OECD-UNDESA, *World Migration in Figures: A Joint Contribution by UN-DESA and the OECD to the United Nations High-Level Dialogue on Migration and Development*, 3 -4 October 2013, p. 2, available at <http://www.oecd.org/els/mig/World-Migration-in-Figures.pdf> [last accessed on 2 April 2014].

² For the purposes of this thesis, “immigrant women” and “migrant women” should be interpreted as referring to third-country national women, i.e. women who are not Union citizens, legally entering and residing in the European Union for purposes related to the family or employment.

³ Eurostat, *First permits by reason, age, sex and citizenship* (most recent data from 2012), available at <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database> [last accessed on 12 June 2014]. In addition to family reunification – which consists of bringing to the host country immediate family members such as spouses or children – “family reasons” may also refer to other types of family migration (KOFMAN, E., MEETOO, V., ‘Family Migration’, in International Organization for Migration, *World Migration Report*, 2008, p. 155. See also PIPER, N., *Gender and Migration*, Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, 2005, p. 22). For instance, family migration can also occur through family formation or marriage migration, whereby second or subsequent generations of children of immigrant origin bring in a spouse from their parents’ or grandparents’ country of origin, or whereby a settled immigrant or citizen brings in a spouse from abroad. Other types of family migration consist in the migration of the entire family or sponsored family emigration of relatives outside the immediate family.

⁴ EUROSTAT, *Migrants in Europe: A Statistical Portrait of the First and Second Generation*, Eurostat Statistical Books, 2011, pp. 32 – 33.

navigate life in their new host country. This dependence is caused by material factors such as language barriers, lack of knowledge of their new host country and its laws, lack of social and possibly family networks that the migrant could rely on in the country of origin, and so forth. In terms of family migration aimed at joining a spouse in the host country, this dependence may cause serious gender imbalances within spousal relationships at the disadvantage of the joining family member. Indeed, many immigrant women report negative effects of this enforced role of dependent family member, not only on their self-esteem but also for their opportunities of regaining autonomy, as well as their freedom to reject certain roles within the family⁵. The factual dependence of immigrant women joining partners or husbands in the host country has indeed been identified as a significant push for these women to conform to the socio-economic and conjugal role their partners have designed for them⁶.

Furthermore, dependence in the context of family migration can also undermine immigrant women's possibilities of effectively reacting to domestic violence. The dependency of secondary migrants on others makes them vulnerable to exploitation within their families⁷; for women who suffer from domestic violence, that dependence may seriously undermine their possibility to leave violent husbands⁸. This perverse effect of family migration is particularly serious and constitutes one of the reasons immigrant women are considered to be at particular risk of domestic violence⁹.

Immigrant women may also experience specific difficulties when sponsoring the migration of family members, i.e., when they are the ones residing in the host country and intend to sponsor reunification with a family member (e.g. husbands, partners, children, ascendants, etc.) left behind. In this case, the most common challenge is meeting the material

⁵ STRASSER, E., KRALER, A., BONJOUR, S., BILGER, V., 'Doing Family', 14(2) *The History of Family* (2009) 165, p. 174.

⁶ ROCA I GIRONA, J., SORONELLAS MASDEU, M., BODOQUE PUERTA, Y., 'Migraciones Por Amor: Diversidad y Complejidad de las Migraciones de Mujeres', 97(3) *Papers: Revista de Sociologia* (2012) 285, pp. 703 - 704 [translation mine]. Despite the focus of this research on Slavic or Latin American women married to Spanish men, the relevance of the cited observations goes beyond the specific group analysed and can be applied to other groups of immigrant women entering Europe for the purpose of joining a partner or a spouse.

⁷ Strasser, E., Kraler, A., Bonjour, S., Bilger, V., 'Doing Family', cit., p. 174 - 175.

⁸ *Ibid.*, p. 175.

⁹ In 2009, the Parliamentary Assembly of the Council of Europe devoted a special Resolution to the issue of domestic violence against immigrant women (Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, adopted on 20 November 2009). Among the reasons this category was considered to have a disproportionate risk of domestic violence, the Council included the fact that "migrant women in Europe face twofold discrimination based both on their gender and their origin" (*Ibid.*, § 1) and their eventual belonging to "communities marked by a strong patriarchal culture" (*Id.*), explaining their specific difficulties in reacting to such violence by observing how "confronted with the language barrier and family pressure, [immigrant women] often end up isolated and unable to express their views and have only limited access to any facilities that exist to protect the victims of domestic violence" (*Id.*).

requirements that are posed as preconditions for sponsoring family reunification. In terms of income this category fares comparatively worse than both female and male natives, on the one hand, and male migrants, on the other. Due to structural inequalities on intersectional grounds of gender and immigrant or ethnic origin, immigrant women experience the worst pay on their host country's labour market¹⁰. As a result, immigrant women are disproportionately and negatively affected in their potential to sponsor family reunification with partners and children by comparison to their male counterparts. Indeed, their chances to successfully apply for family reunification may be lower due to their labour market position, and to their consequent difficulties in gathering the necessary financial resources¹¹.

Moving on to immigrant women's employment, it must be noted first that their access to the host country's labour market can occur either through labour migration – i.e., through migration for the specific purpose of working in the host country – or through access to employment of immigrant women residing in the host country on a different ground – for instance, on the grounds of a residence permit for family reasons. In both cases, however, immigrant women experience disproportionate difficulties in accessing national labour markets both in comparison to their male counterparts and in comparison to native workers. In addition to possible family pressures, another and in my view more significant explanation of this phenomenon lies in employment discrimination on the grounds of several factors (such as nationality, gender, ethnicity, religion and migration status) that influence both access and integration in the host countries' labour market and the sectors of the labour market where immigrant women concentrate¹². In this respect, in her explanatory memorandum

¹⁰ European Union Agency for Fundamental Rights, *Migrants, Minorities and Employment: Exclusion and Discrimination in the 27 Member States of the European Union, Update 2003- 2008*, Publication Office of the European Union, 2010, p. 74. On this matter, see also KOFMAN, E., ROOSBLAD, J., and KEUZENKAMP S., 'Migrant and Minority Women, Inequalities and Discrimination in the Labour Market', in Kraal, K., Roosblad, J., and Wrench, J., *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Politics of Diversity*, IMISCOE Reports, Amsterdam University Press, 2009, p. 56 ff.

¹¹ KOFMAN, E., 'Gendered Migrations, Livelihoods and Entitlements in European Welfare Regimes', in Piper, N. (ed.), *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements*, Routledge, London, United Kingdom, 2008, p. 77. See also KRALER, A., *Civic Stratification, Gender and Family Migration Policies in Europe: Final Report*, International Centre for Migration Policy Development, Vienna, May 2010, who observes that "carrying the full (financial) responsibilities as a sponsor may be experienced as more difficult for women, in particular in the context of generally less favourable employment opportunities for women and if there are children and related child caring responsibilities" (*ibid.*, p. 57). Furthermore, see Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, Doc. 12549, 24 March 2011, § 22.

¹² See MORENO-FONTES CHAMMARTIN, G., *Female Migrant Workers' Situation in the Labour Market*, Thematic Review Seminar of the European Employment Strategy, ILO's International Migration Programme, 2008, and Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population,

accompanying the Council's draft Resolution and Recommendation on protecting migrant women in the labour market, the Special Rapporteur for the Committee on Migration, Refugees and Population¹³ highlighted the higher prevalence of unemployment and underemployment among migrant women in comparison to both native-born women and native men"¹⁴. While acknowledging that in some instances cultural reasons may play a role¹⁵, the Rapporteur emphasised that the level of employment of immigrant women is much more strongly linked to the characteristics of the host society and its labour market¹⁶.

Discrimination also affects immigrant women workers once they have entered the labour market, i.e., in their employment relationships. On a broad level, in its General Recommendation No. 26 of 2008¹⁷ the CEDAW Committee highlighted several forms of *de jure* and *de facto* discrimination affecting this category, including a strong sectorialisation in sectors of the labour market considered appropriate for women, such as domestic work and entertainment, and characterised by lower wages and less job mobility, as well as a higher vulnerability to discriminatory dismissal for pregnancy reasons and to sexual abuse, harassment and physical violence¹⁸. The concentration of immigrant women in labour market sectors associated with traditional gender roles is strictly connected with multiple sources of disadvantage and vulnerability of immigrant women workers, including de-skilling and over-qualification¹⁹, low pay, bad working conditions²⁰, and lower labour protections²¹.

Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, cit., § 40 - 48.

¹³ Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, cit.

¹⁴ *Ibid.*, § 12.

¹⁵ *Ibid.*, § 14.

¹⁶ *Ibid.*, § 13.

¹⁷ Committee on the Elimination of Discrimination against Women, *General Recommendation No. 26 on Women Migrant Workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

¹⁸ *Ibid.*, § 13 ff. See also Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, cit., § 10.

¹⁹ Immigrant women experience the highest degree of de-skilling by comparison to both native workers and to their male counterparts. This is not only observable at the European level, where in 2011 the over-qualification rate of non-EU born female workers amounted to 39% (in comparison to 35% for non-EU born male workers and 32% for workers born in the Union), but is also particularly marked in our national case studies' labour markets. Indeed, in the same year the over-qualification rates for non-EU born women workers in Italy were as high as 67%, compared to 57% for non-EU born male workers and 20% for the total population. Similarly, the corresponding rates for Spain in 2011 amounted to 63% for non-EU born women workers, versus 50% for their male counterparts and 36% for the total population. On these matters, see Eurostat, *Overqualification Rate by Groups of Country of Birth, Age groups and Sex*, 2011, available at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_social_policy_equality/migrant_integration/indicators [last accessed on 19 April 2013]. See also RUBIN, J., RENDALL, M. S., RABINOVICH, L., TSANG, F., VANORANJE-NASSAU, C., JANTA, B., *Migrant Women in the European Labour Force: Current Situation and Future Prospects*, RAND Corporation, European Commission, 2008, who highlight that third-country national

While these issues disproportionately affect immigrant women in general, those employed as domestic workers are particularly likely to experience them. Indeed, migrant domestic workers experience a stark contradiction between their high labour market demand and the difficult – and in some cases detrimental – working conditions that characterise the sector²². The high concentration of immigrant women in this field also means that, compared to their male counterparts and to native workers, they are disproportionately affected by the problematic aspects specific to this sector. Firstly, domestic work – and especially when it involves live-in situations – implies a blurring of the boundaries between being an employee and being “one of the family”. It has been shown that this situation, far from creating a

immigrant women with a high degree of education are twice as likely than European citizen women to be employed in low-skill jobs, and in 2005 more than 25% of third-country national immigrant women with high levels of education were employed in low-skill jobs (*ibid.*, p. 95).

De-skilling, in addition to reinforcing a devaluation of immigrant women workers’ “capital (...) and social competence” (Kofman, E., Roosblad, J., and Keuzenkamp S., ‘Migrant and Minority Women’, cit., p. 58) and limiting “their mobility in the labour market, their opportunities for career progression, and their chances for human capital development” (Rubin, J., Rendall, M. S., Rabinovich, L., Tsang, F., Van Oranje-Nassau, C., Janta, B., *Migrant Women in the European Labour Force*, cit., p. 72), may take heavy psychological tolls on this category by disproportionately exposing them to “professional disillusion and loss of the constructive dynamics of their identity” (CHAIB, S., ‘Femmes Immigrées et Travail Salarié’, 16 *Les Cahiers du CEDREF* 2008, 209, § 30, translation mine).

²⁰ The labour market segregation experienced by immigrant women workers in the European legal space must be read in combination with their disproportional concentration in the worst sectors of the labour market, i.e., in those sectors characterised by “low remuneration, heavy workloads comprised of long working hours, limited training facilities, poor career development” (Moreno-Fontes Chammartin, G., *Female Migrant Workers’ Situation in the Labour Market*, cit., p. 4). Indeed, the Committee on Migration, Refugees and Population observed that most of the sectors where women workers concentrate “offer worse working conditions for migrant women than for local counterparts [such as] short-term contracts without opportunity of renewal, low wages, long working hours and physically demanding jobs” (Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, cit., § 11.).

²¹ As a result of their concentration in sectors of the labour market that are highly unregulated and have low labour protection, immigrant women gain “less access to benefits such as training, health insurance, paid or unpaid sick leave, maternity leave, employment protection and other social rights” (Kofman, E., Roosblad, J., Keuzenkamp, S., ‘Migrant and Minority Women’, cit., p. 54). Therefore, this category appears to be disproportionately and negatively affected in their possibilities to benefit from a safety net or support system, constituted for instance by the chance of upward mobility on the occupational ladder through vocational training, or access to unemployment benefits in case of redundancy, or even the possibility to freely determine their reproductive life without fear of losing their employment.

²² Immigrant women are strongly present in this sector. In 2008, 18% of employed third-country national women between the age of 25 and 54 were employed as domestic workers (Eurostat, *Migrants in Europe*, cit., p. 95). In countries such as Spain and Italy, the number of immigrant women employed as domestic workers is even more significant. In fact, a recent study by the International Labour Organization (International Labour Organization, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*, International Labour Office, Geneva, Switzerland, 2013, see in particular p. 35 ff.) has highlighted that these two States, together with France, are the biggest employers of domestic workers in Europe. In 2010 Spain had a total of 747,000 domestic workers²². Currently, 90% of domestic workers in Spain are female, and the vast majority of them are foreign-born – emigrated especially from Latin America (*Ibid.*, p. 35). Similarly, in Italy 419,400 domestic workers were employed in 2008, with a minimum female share of 79% and with a percentage of migrants amounting to 78.4%, mainly from Eastern Europe, Asia and South America (*Ibid.*, p. 36).

welcoming and positive working environment, is often used by employers – consciously or not – as a way of demanding continuous availability, stretching working hours and multiplying demands²³. Secondly, the isolation caused by working in a private household can be emotionally and psychologically difficult²⁴. Thirdly, the correspondence between the workplace and the private household may also trigger, and at the same time hide, exploitation and abuse against domestic workers – for instance due to the difficulty for labour inspections in the private realm of the household, or because of the highly personalised character of their employment relationships²⁵.

As I have made clear in this brief overview, the specific problems and disadvantages experienced by immigrant women in the European legal space have been widely acknowledged by European institutions, either through the commissioning of dedicated reports and studies or through special recommendations or comments. However, what has been missing so far is a critical analysis of the role of law in reinforcing the described factual barriers to immigrant women's enjoyment of their rights in the fields of family life and employment. This thesis starts from the consideration that law – first and foremost immigration law – may generate perverse and gendered effects that prevent immigrant

²³ See for instance KINDLER, M., 'The relationship to the Employer in Migrant's Eyes: the Domestic Work Ukrainian Migrant Women in Warsaw', 12 *Cahiers de l'URMIS* (2009), §15 ff. See also LUTZ, H., 'When Home Becomes a Workplace: Domestic Work as an Ordinary Job in Germany?', in Lutz, H. (ed.), *Migration and Domestic Work: a European Perspective on a Global Theme*, Ashgate, Aldershot (UK) and Burlington (USA), 2008, pp. 52-58 and Piper, N., *Gender and Migration*, cit., p. 8). As a result, domestic workers (especially live-ins) often experience situations in which they are continuously on-call, do not enjoy proper rest periods and are requested to do additional work that is not however recognised as such.

²⁴ It has been argued that the visibility of immigrant domestic workers in the household's daily life contrasts with the denial of their presence and with a general attitude of rejection in the public sphere, and that such social alienation gives ground to "a subordinate position due to the socio-cultural extraneousness attributed to foreign women employed in the private sector" (MIRANDA, A., et al., 'Les Mobilisations des Migrantes: un Processus d'Émancipation Invisible?', 51 *Cahiers du Genre* 2011/2012, 5, p. 8 ff.). This creates an identification of immigrant status, female sex and in some cases a certain national or ethnic origin with the domestic sphere, which fosters the social disqualification and depersonalisation of immigrant women by equating them with certain stereotypically attributed characteristics (see MIRANDA, A., 'Une Frontière Dans l'Intimité: la Confrontation Culturelle Entre Femmes Étrangères et Femmes Autochtones Dans l'Espace Domestique', 12 *Les Cahiers du CEDREF* 2004, 115, §27; see also MIRANDA, A., *Migrare al Femminile: Appartenenza di Genere e Situazioni Migratorie in Movimento*, McGraw-Hill, Milano, Italy, 2008, pp. 106 and 120). On how the confusion between employment and family-like obligations masks forms of "othering", alienation and subordination of immigrant domestic workers on intersecting grounds of sex, immigrant status, ethnic and national origin, see also Miranda, *Migrare al Femminile*, cit., p. 120, as well as OZYEGIN, G., HONDAGNEU-SOTELO, P., 'Conclusion: Domestic Work, Migration and the New Gender Order in Contemporary Europe', in Lutz, H., (ed.), *Migration and Domestic Work: A European Perspective on a Global Theme*, cit., p. 199-200.

²⁵ On these matters, see for example International Labour Conference, Report IV, *Decent Work for Domestic Workers*, 99th Session, Geneva, 2010, § 248, and International Labour Conference, Report I(B), *A Global Alliance Against Forced Labour*, 93rd Session 2005, p. 50.

women's enjoyment of their rights in conditions of equality with both immigrant men and citizen women.

In the light of these observations, the aim of this thesis is to verify the existence of a gender bias in laws applicable to immigrant women in the European context (primarily but not exclusively immigration law), and to explore possible legal remedies to such a bias in areas where the latter will be identified. Among possible remedies, I will explore in particular the ameliorative and transformative potential of human and fundamental rights law in force in the European legal space. While doing so, I will consider the beneficial effects as well as the shortcomings of human and fundamental rights *per se* and in their application, and I will develop constructive proposals in order to enhance the former and correct the latter.

In order to delimitate my field of analysis within the extremely vast subject of immigrants' human and fundamental rights, I will focus in particular on third-country national women legally entering and residing within the territory of the European Union. In some instances, however, this category may inevitably overlap with that of third-country national women irregularly present on the Union territory – especially because the disparate impact of certain norms applicable to legally resident migrants may also undermine third-country national women's access to or maintenance of residence permits.

Throughout my analysis, I will refer to family life and employment as domains rather than as strictly rights. More specifically, I propose a notion of family life and employment as clusters of rights and entitlements. In this sense, family life should be understood as including crucial rights for immigrant women such as the right to spousal equality, the right to access family reunification and to enjoy family unity in conditions of equality, the right to live free of domestic violence, as well as the right to protection during pregnancy. Similarly, I have chosen to understand the employment domain as encompassing the right to access the host country's labour market in conditions of equality and non-discrimination, the right to non-discrimination in the workplace and in relation to dismissal, freedom from exploitation and abuse by employers, as well as access to justice in relation to employment matters.

While I am aware that the rights to family life and to employment are not necessarily interpreted as including all of the mentioned aspects, I propose this different understanding of family life and employment for two main reasons. Firstly, this construction is in my view better able to reflect immigrant women's complex experiences in their host countries as well as their specific difficulties. Thus, in the described clusters I have included areas where immigrant women may be disproportionately and negatively affected by apparently neutral

legal norms. Secondly, the described approach will allow me to better identify the eventual gender bias of norms applicable to this group, not only on the grounds of an isolated consideration of each legal source, but also through an analysis of their interconnections and interaction. By referring to family and employment as multi-dimensional clusters, I will be able to analyse how legal norms that are not normally connected to each other because they are assigned to different domains by disciplinary divides (e.g. immigration law, but also employment law, criminal law, family law, and so forth) may actually present a gender bias that results from the disparate impact that they jointly produce on immigrant women in one or multiple aspects of the said clusters.

In areas where a gender bias is identified, I will assess the potential of human and fundamental rights law to remedy this bias as well as their limitations in this area. In order to answer this research question, my analysis will cover different dimensions at the same time. A first aspect that I will address concerns the impact that human and fundamental rights law have had so far on immigrant women's family life and employment. In this context, I will discuss the relevant norms in this field, defining the content and scope of human and fundamental rights. Specific attention will also be paid to their judicial application and interpretation by competent courts, in cases where the latter enjoyed a margin of discretion because of the general character of the norms at issue or due to a potential conflict between different norms. The judicial decisions analysed in this respect will relate to cases initiated by or in any case directly involving immigrant women, and will be chosen for their particular significance as examples of the role played by human and fundamental rights (whether positive or negative) in relation to immigrant women's protection in the mentioned domains. In this sense, my analysis should not be understood as aspiring to be comprehensive or all encompassing, but rather as more focused on a qualitative assessment of the actual and potential impact of human and fundamental rights on immigrant women's lives. Furthermore, a consideration – when relevant – of the regulatory impact of human and fundamental rights law will also be carried out, enquiring into their eventual role in inspiring or triggering more gender-sensitive norms of direct relevance for immigrant women.

A second aspect of my analysis will be more constructive, and will tackle the question of what role human and fundamental rights law could play in ensuring a stronger consideration of immigrant women's needs and difficulties in the domains of family life and employment by legal norms applicable to them. I will draw insights from meaningful examples of judicial interpretation of these sources and on their possibility of further development for the purpose

of ensuring this groups' access to their rights and entitlements in conditions of equality and non-discrimination. While not assuming that human and fundamental rights law are necessarily the solution in this field, and while conscious that these sources may in fact be affected by gendered shortcomings themselves, I will then offer my own perspective on the most fruitful approaches in this area.

This thesis will analyse human and fundamental rights law as recognised and enforced in the European legal space at three different levels: international law, European Union law and domestic law. When examining these different legal orders, I will concentrate on different components of the family life and employment clusters, choosing those dimensions that have gained explicit recognition in each specific order and that have been judicially analysed and interpreted by competent courts in that context.

The thesis is thus structured as follows. In chapter 1, I will discuss the human rights framework established by the Council of Europe, paying special attention to the European Convention on Human Rights. In particular, I will examine the interaction between this framework and specific provisions of national immigration law in the Strasbourg Court's analysis, looking at their significance for immigrant women's rights in the fields of family life and employment.

In chapter 2, I will consider the fundamental rights framework emerging in the context of the European Union, with a special focus on the Charter of Fundamental Rights of the European Union as well as on the fundamental rights and freedoms established in the EU Treaties. This chapter will then mainly focus on the interaction between European fundamental rights law as interpreted by the European Court of Justice and problematic norms of European immigration law from a specifically gendered point of view.

Chapters 3 and 4 will be devoted to the analysis of two national case studies – respectively Italy and Spain. After Germany, these two countries currently experience the highest proportion of resident third-country national women in Europe²⁶, and thus constitute a particularly apt field of enquiry for my purposes. Both Italy and Spain have incorporated international human rights law and European fundamental rights law in their domestic orders through their national Constitutions, granting them with a special status. Furthermore, the Italian and the Spanish Constitutions enshrine their own system of fundamental rights. As a

²⁶ Eurostat, *Population by Sex, Age Group and Citizenship*, 2013, available at http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=MIGR_POP1C_TZ [last accessed on 2 April 2014].

result, both countries are characterised by a rich and heterogeneous systems of protection of human and fundamental rights. Therefore, in chapters 3 and 4 I will explore the potential of these fundamental rights law frameworks to correct biased provisions of domestic law applicable to immigrant women in the fields of family life and employment. Moreover, I will consider the eventual impact of supranational human and fundamental rights law in these domestic orders in an effort to understand whether and to what extent such an interaction has been fruitful for this category.

While several crucial contributions have been offered with respect to specific issues or specific contexts²⁷, the broader potential of human and fundamental rights law to constitute an effective tool to correct the gendered shortcomings of legal norms applicable to immigrant women in the European context has not been discussed in legal academia. The significance of international human rights law for immigrants on the one hand, and for women on the other, has instead been at the heart of lively academic debates for decades.

As to the first aspect, legal and socio-legal scholars have consistently investigated the meaning of international human rights law for immigrants' rights. The view whereby modern international human rights law has caused the emergence of a post-national citizenship, thus grounding migrants' access to rights in their host countries on a more universalistic basis identified with personhood and humanity²⁸, has been particularly debated. Many have indeed highlighted that international human rights law, while certainly relevant, has not definitely broken the links between human rights and citizenship. In fact, it has been argued that international human rights law in Europe still reproduces internal borders (understood as the construction of rights on the grounds of migration status)²⁹ and that migrants are still excluded from socio-legal citizenship of their host countries in many crucial respects³⁰. In relation to this, it has also been pointed out that human rights law has hardly trumped the citizenship/non-citizenship dichotomy and substituted it with the concept of humanity,

²⁷ For the purpose of my research, the importance of the academic work of scholars such as Sarah Van Walsum, Siobhán Mullally, and Ruth Mestre i Mestre, to name a few, is undeniable and will be appropriately highlighted throughout this thesis.

²⁸ SOYSAL, Y. N., 'Post-National Citizenship: Rights and Obligations of Individuality', in Amenta, E., Nash, K., Scott, A., *The Wiley-Blackwell Companion to Political Sociology*, Wiley-Blackwell, Chichester, Malden, 2012, p. 383 ff.

²⁹ KESBY, A., *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford University Press, Oxford, 2012, p. 92 ff.

³⁰ LISTER, M., PIA, E., *Citizenship in Contemporary Europe*, Edinburgh University Press, Edinburgh, 2008, pp. 62 – 63.

considering that human rights law itself rests on the assumption of a state-based world order³¹.

As to the potential of international human rights law to offer effective recognition of women's specific difficulties and needs, an ongoing critique in feminist legal scholarship is clearly identifiable. Criticism of the inadequacy of this source to protect women's rights in conditions of equality with men has touched upon many different aspects. Traditionally, international human rights law has been criticised for its entrenchment with the public/private distinction typical of liberal theory, limiting its scope to the public realm and leaving out the private sphere – where crucial violations of women's human rights occur³². Other important and more recent criticism has concerned the frequent marginalisation of women's rights as sub-categories of human rights and the adoption of approaches excessively focused on victimisation discourses in international human rights law³³. Lastly, a re-characterisation of this source has been deemed necessary in order to ensure its gender-sensitive implementation³⁴.

In sum, while the import of international human rights law for immigrants on the one hand and for women on the other has been widely discussed, these two loose ends have yet to meet. This thesis aims to mark a step in this direction by exploring the actual and potential impact, as well as the shortcomings, of human and fundamental rights law *vis-à-vis* biased legal norms applicable to immigrant women.

³¹ RUBIO MARIN, R., 'Integration in Immigrant Europe: Human Rights at a Crossroads', in Rubio Marin, R., (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014, pp. 90-91. In the same volume, see also p. 10.

³² LACEY, N., 'Feminist Legal Theory and the Rights of Women', in Knop, K., (ed.), *Gender and Human Rights*, Oxford University Press, Oxford, New York, 2004, p. 22.

³³ OTTO, D., 'Women's Rights', in Moeckli, D., Shah, S., Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, Oxford, 2010.

³⁴ COOK, R. J., 'Women's International Human Rights Law: The Way Forward', in Cook, R. J., (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 2011, p. 3 ff.

CHAPTER ONE

European Human Rights Law:

A Common Standard of Protection for Immigrant Women's Enjoyment of Family Life and Employment?

Introduction

Since its inception, the Council of Europe has been committed to creating a solid human rights framework with the European Convention on Human Rights as its cornerstone³⁵. The significance of this source for immigrants in the European legal space has been the subject of a lively academic debate. Some scholars have suggested that the Convention constitutes a great example of the positive impact that human rights law can produce on immigration law, and thus on immigrants' lives³⁶. Others hold less enthusiastic views, stressing the structural limitations of the human rights framework established by the European Convention as well as the shortcomings of the European Court of Human Rights' judicial activity in the field of migration³⁷. In the context of these critiques, however, the specific significance of the

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953 (CETS No. 005).

³⁶ SOYSAL, for instance, repeatedly referred to the European Convention in support of her argumentation that international human rights law is particularly beneficial for immigrants because it promotes a universal conception of personhood, replacing the traditional models of membership based on citizenship and nationality (SOYSAL, Y. N., *Limits of Citizenship: Migrants and Postnational Membership in Europe*, University of Chicago Press, Chicago; London, 1994, especially p. 150 ff.) More recently, ANAGNOSTOU has included immigrants among the categories of marginalised individuals which have in her view greatly benefited from the protection offered by the European Court of Human Rights (ANAGNOSTOU, D., 'The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities', in Anagnostou, D., Psychogiopoulou, E., (eds.), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, Martinus Nijhoff Publishers, Leiden; Boston, 2010).

³⁷ Several limitations of the Strasbourg Court's jurisprudence have been highlighted by BATTJES ET AL. (BATTJES, H., DEMBOUR, M., DE HART B., FARAHAT, A., SPIJKERBOER, T., VAN WALSUM, S., 'The European Court of Human Rights and Immigration: Limits and Possibilities', 11(3) *European Journal of Migration and Law* (2009) 199). Such limitations include the Court's sharing of a general judicial reticence to curtail state sovereignty in the sensitive area of immigration law, as well as its strong focus on migrants' foreign identity – which prevents a broader comparative analysis of the rights enjoyed by migrants and citizens respectively. Criticism of the tendency of the Strasbourg Court to avoid questioning states' territorial sovereignty in migration matters has also been expressed by CORNELISSE, who emphasises how this approach prevents human rights from realising their full potential in relation to immigrants' claims for individual justice (CORNELISSE, G., 'A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty', in

European Convention on Human Rights for immigrant women has seldom been discussed³⁸. A similar discourse can be extended to another key Council of Europe treaty for immigrant's human rights, i.e., the European Social Charter³⁹ – although theoretical analyses on this source's impact on migration issues have been sparser⁴⁰.

Against this background, in this chapter I aim to understand whether and to what extent European human rights law⁴¹ has so far produced a positive impact on national immigration law from the specific point of view of immigrant women, and to enquire into its potential in this respect. In order to do so, this chapter will analyse the interaction between two main legal realms that play a crucial role in immigrant women's enjoyment of their rights to family life and employment, i.e., national migration law in the European context and European human rights law. In particular, the European human rights framework will be critically assessed with a dual aim. Firstly, I seek to identify the specific gendered shortcomings in national legal norms that produce a disparate impact on immigrant women's access to their rights in the fields of family life and employment. Secondly, I aim to explore whether such a framework is actually capable of correcting the highlighted gender bias by trumping problematic domestic law provisions or by steering national authorities away from gender-insensitive enforcement practices, and to unveil its eventual failings in this respect.

Thus, after providing a broad outline of the main elements of European human rights law relevant to immigrant women's family life and employment in the European legal space, in

Dembour, M., Kelly, T., (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, Abingdon, 2011.

³⁸ A group of legal scholars (whose argumentations will be discussed when relevant in specific sections of this chapter) has in fact analysed the Court's jurisprudence on migration matters from a gendered point of view, but in relation to specific issues or even on individual judgments, rather than with the aim of making a broader assessment of the Court's judicial activity in relation to immigrant women in the European legal space in relation to family life and employment.

³⁹ European Social Charter (Revised), signed on 3 May 1996, entered into force on 1 July 1999 (CETS No. 163)

⁴⁰ See for instance CHOLEWINSKI, R., 'The Human and Labor Rights of Migrants: Visions of Equality', 22 *Georgetown Immigration Law Journal* (2007 -2008) 177, pp. 190-191.

⁴¹ In this chapter, I have chosen to focus on the European Convention on Human Rights and on the European Social Charter because of the related availability of judicial or semi-judicial interpretations concerning these sources which touch upon crucial aspects of immigrant women's family life and employment. Furthermore, my specific focus on the European Convention on Human Rights is justified by the fact that the European Court of Human Rights implemented and enforced this source's provisions in the context of individual applications, which were either raised by immigrant women or of direct relevance for this group. For these reasons, while conscious of their great significance for immigrant women, in this chapter I will not discuss other human rights sources such as the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted by the United Nations General Assembly with resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003, 2220 UNTS 3), the International Labour Organization's Convention Concerning Decent Work for Domestic Workers (adopted on 16 June 2011, entered into force on 5 September 2013, C189/2011), or the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence – the so-called Istanbul Convention (adopted on 11 May 2011, entered into force on 1 August 2014, CETS No. 210).

the first part of this chapter I will assess the interaction between problematic norms of national immigration law and this category's human right to family life. Subsequently, I will move on to analyse the relationship between relevant rules of labour migration law and immigrant women's human rights in the field of employment.

1. European Human Rights Law: Relevant Provisions for Immigrant Women in the Fields of Family Life and Employment

The European Convention on Human Rights establishes several important rights in the fields of family and employment that have the potential for a fruitful application to specific difficulties experienced by immigrant women in the European legal space. In the field of family, the key provision in the Convention is constituted by article 8, which grants every individual the right to respect for his or her private and family life. Art. 8(2) prohibits every interference by a public authority with the exercise of such human right "except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". The balance of interests enshrined in article 8 of the Convention has grounded an extremely rich and abundant case law by the European Court of Human Rights on two main aspects of third-country national immigrants' enjoyment of their right to family life. On the one hand, a consolidated case law has developed with respect to immigrants' access to family reunification *vis-à-vis* restrictive national family migration policies⁴². On the other hand, the Strasbourg Court has established important principles concerning limitations to the expulsion of foreigners when their enjoyment of family life may be compromised, in an effort to balance immigrants' interest to enjoy such family life in the host country and the state's interest to control migration⁴³.

In addition to the right to family life, two key provisions specifically relate to marriage. Firstly, article 12 establishes a human right to marry, i.e., the right "of men and women of

⁴² See for instance *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, application no. 9214/80; 9473/81; 9474/81, judgment of 25 May 1985, *Gül v. Switzerland*, application no. 23218/94, judgment of 19 February 1996, *Ahmut v. the Netherlands*, application no. 21702/93, judgment of 28 November 1996, *Şen v. the Netherlands* (First Section), application no. 31465/96, judgment of 21 December 2001.

⁴³ See for instance *Boultif v. Switzerland* (Second Section), application no. 54273/00, judgment of 2 August 2001, *Rodrigues da Silva and Hoogkamer v. the Netherlands* (Second Section), application no. 50435/99, judgment of 31 January 2006, *Üner v. the Netherlands* (Grand Chamber), application no. 46410/99, judgment of 18 June 2006, *Nunez v. Norway* (Fourth Section), application no. 55597/09, judgment of 28 June 2011.

marriageable age” to “marry and to found a family”. A wide margin of discretion is however left to States Parties of the Convention, since art. 12 also specifies that such a right may be enjoyed in accordance “to the national laws governing the exercise of this right”. Secondly, Protocol no. 7 to the Convention⁴⁴ importantly includes a provision on spousal equality. Its article 5, indeed, establishes a principle of equality between spouses: “spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in relations with their children, as to marriage, during marriage and in the event of its dissolution”.

Arguably, the right to marry and to found a family may be read in conjunction with the right to family life and plays an important role in cases concerning prerequisites imposed by national legal regimes which limit foreigners’ possibility to marry on the host countries’ territory⁴⁵. On the other hand, article 5 of Protocol no. 7 appears to be particularly important for immigrant women’s enjoyment of spousal equality and more broadly of equality within the family. In the light of the broader non-discrimination principles established by art. 14 of the Convention and by art. 1 of Protocol No. 12, the provision enshrined in article 5 of Prot. No. 7 emerges as an important specification of equality and non-discrimination in the field of family relationships.

In the field of family life, it is also extremely important to recall that the Strasbourg Court consistently interpreted several articles of the Convention as enshrining a right to live free of domestic violence. This case law concerned in particular the right to life enshrined in art. 2⁴⁶, the prohibition of torture established by art. 3, and the right to respect for private and family life ex art. 8 of the Convention in applications brought by the victims themselves, both taken alone and in conjunction with the prohibition of sex discrimination under art. 14⁴⁷.

Moving on to employment, the Convention does not explicitly establish a human right to work, nor a right to fair working conditions. Nonetheless, this source includes important provisions on employment matters that – despite not being all-encompassing – tackle both extreme phenomena of exploitation and abuse of workers and more ordinary issues in the

⁴⁴ Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22 November 1984 and entered into force on 1 November 1988, CETS no. 117.

⁴⁵ See for instance European Court of Human Rights, *O’Donoghue and Others v. the United Kingdom* (Fourth Section), application no. 34846/07, judgment of 14 December 2010.

⁴⁶ *Kontrová v. Slovakia* (Fourth Section), application no. 7510/04, judgment of 31 May 2007; *Branko Tomašić and Others v. Croatia* (First Section), application no. 46598/06, judgment of 15 January 2009; *Opuz v. Turkey* (Third Section), application no. 33401/02, judgment of 9 June 2009.

⁴⁷ *Bevacqua v. Bulgaria* (Fifth Section), application no. 71127/01, judgment of 12 June 2008; *Opuz v. Turkey*, cit.; *E.S. and Others v. Slovakia* (Fourth Section), application no. 8227/04, judgment of 15 September 2009; *A. v. Croatia* (First Section), application no. 55164/08, judgment of 14 October 2010; *Valiulienė v. Lithuania* (Second Section), application no. 33234/07, judgment of 26 March 2013.

field of employment. On the one hand, indeed, article 4 establishes a prohibition of slavery, servitude and forced or compulsory labour – which bears the potential of constituting a powerful tool for immigrant women workers to contrast phenomena of exploitation and abuse in their employment relationships. On the other hand, article 5 grounds the general freedoms of assembly and of association, which also include “the right to form and to join trade unions for the protection of his interests”. Furthermore, art. 1 of Protocol no. 1⁴⁸ establishes a general right to the peaceful enjoyment of one’s possessions which the Strasbourg Court has consistently relied on to assess cases concerning individuals’ enjoyment of social security benefits⁴⁹. Finally, it is important to stress that the non-discrimination and equality principles affirmed by art. 14 of the Convention and art. 1 of Protocol No. 12 also apply to the field of work. In this respect, it has been rightly noted that while the Convention does envisage these important rights for workers, it leaves most labour rights and social rights to the European Social Charter⁵⁰. In fact, the European Social Charter envisages a range of human rights in the field of employment of key importance not simply for immigrant workers in general but for immigrant women workers specifically.

On a broad level, in its article 1 the Charter recognises a general right to work and a corresponding state obligation to ensure the highest possible level of employment as well as to protect workers’ right to earn their living through a freely entered into occupation. Articles 2 and 3 respectively establish workers’ rights to just working conditions (mainly with reference to working hours and daily, weekly and yearly rest) and workers’ right to safe and healthy working conditions. Moreover, several provisions of the Charter grant key social rights to workers, such as the right to vocational guidance and vocational training (articles 9 and 10 respectively), the right to social security as well as to social and medical assistance (articles 12 and 13 respectively), the right to health protection (article 11), the right to benefit from social welfare services (article 14), and the right to protection against unjustified dismissal (art. 24).

With specific reference to immigrant women, several provisions are of particular interest. Firstly, some of such rights constitute significant affirmations of the principle of sex equality

⁴⁸ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 20 March 1952, entered into force on 18 May 1954, CETS No. 9.

⁴⁹ Just by way of example, I shall cite *Koua Poirrez v. France* (Second Section), application no. 40892/98, judgment of 30 September 2003, *Stec and Others v. the United Kingdom* (Grand Chamber), applications nos. 65731/01 and 65900/01, judgment of 12 April 2006, *Moskal v. Poland* (Fourth Section), application no. 10373/05, judgment of 15 September 2009, and *Andrle v. the Czech Republic* (Fifth Section), application no. 6268/08, judgment of 17 February 2011.

⁵⁰ MANTOUVALOU, V., ‘Are Labour Rights Human Rights?’, 3(2) *European Labour Law Journal* (2012) 151, p. 157.

in the specific field of employment. For instance, article 4(3) establishes workers' rights to a fair remuneration with specific reference to "the right of men and women workers to equal pay for work of equal value". Similarly, article 20 recognises a "right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex", which binds States Parties to take appropriate measures to enforce such a right in the fields of access to employment, protection against dismissal, vocational guidance and training, terms of employment and working conditions (including remuneration) as well as career development. Furthermore, despite its gender-neutral language, article 27 may also be considered as a provision that is particularly protective of women workers' right to equality and non-discrimination with respect to employment, since it envisages a "right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers". It is clear that while this provision is directed at both men and women workers with family responsibilities, the "appropriate measures" outlined by art.27(1) – such as allowing workers to re-enter employment after an absence due to family responsibilities, the development of childcare facilities or access to parental leave – at present time disproportionately benefit women workers because of their disproportionate care burdens by comparison to their male counterparts.

Secondly, certain rights recognised by the Charter apply specifically to women workers. Important provisions for women workers are for example established by article 8, which grants them with a right to protection of maternity, entailing States Parties' obligation, among others, to grant paid maternity leave for at least fourteen weeks, to prohibit dismissal during pregnancy and maternity leave and to grant time off for breastfeeding. Similarly, article 26(1)– establishing a "right to dignity at work" – specifically tackles "sexual harassment in the workplace or in relation to work" by obliging States Parties to "take all appropriate measures to protect workers from such conduct".

It should also be noted, in relation to provisions of the Charter devoted to specific categories, that this source includes two articles focusing on migrant workers. In particular, article 18 grants workers "the right to engage in a gainful occupation in the territory of any other Party", while article 19 recognises "the right of migrant workers and their families to protection and assistance", which also encompasses States Parties' obligation to guarantee their equal treatment with respect to their own nationals in the fields of "remuneration and other employment and working conditions" (let a.), "membership of trade unions and enjoyment of the benefits of collective bargaining" (let. b) and "accommodation" (let. c).

Against this background, it would appear that the European Social Charter constitutes an important complement to the European Convention on Human Rights, especially because of its specific provisions on women workers and migrant workers. However, the importance of the discussed rights enshrined in the European Social Charter for the specific situation of immigrant women workers in the European legal space may be significantly limited by its scope of application. The Appendix to the Charter, indeed, clarifies that all of its provisions apply to “foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”. Thus, migrant workers may exclusively be covered by the Social Charter if they are citizens of a State Party. Arguably, this restriction excludes the vast majority of third-country national workers residing on the European territory from the Charter’s scope of application. Such a limitation arguably reduces the Charter’s potential to effectively impact national rules applicable to immigrant women, let alone to correct their perverse effects on this category. Nevertheless, it can be argued that the provisions of the Social Charter may produce positive effects by stimulating domestic law enforcing its rights without restrictions on the grounds of nationality, thus also indirectly benefiting immigrant women workers (and migrant workers in general). After all, the Appendix itself clarifies that the restriction of its personal scope does not prevent the extension of the Charter’s rights to other categories of persons.

In sum, with respect to their potentially fruitful application to immigrant women in the field of employment, European human rights sources seem to offer mixed cues. On the one hand, an important aspect which is explicitly covered by the European Convention on Human Rights concerns immigrant women’s possibility to rely on the prohibition of slavery, servitude and forced labour under its article 4 to react to exploitative or abusive working conditions. Moreover, these articles may be fruitfully combined with the principles of non-discrimination and equality between men and women established by art. 14 of the Convention and art. 1 of Protocol No. 12 to unveil an eventual disparate impact of certain labour migration regimes on immigrant women in this context. As for the European Social Charter, several rights relate to specific issues experienced by immigrant women workers in the European legal space. Among them, the right to work *ex art. 1* arguably relates to access to employment, while article 24 explicitly and specifically tackles the issue of protection from unemployment and dismissal. Furthermore, article 2 concerns workers’ rights to non-exploitative working conditions by regulating working hours and rest, while the entire bundle

of rights concerning equality between women and men workers relates to the protection against employment discrimination.

On the other hand, the limited personal scope of the European Social Charter for third-country national workers puts the European Convention in the spotlight of our analysis, prompting the question of how the European Court of Human Rights has implemented the Convention's provisions with specific reference to immigrant women in the European legal space. Therefore, while not completely overlooking the European Social Charter, in this chapter I will focus mainly on the European Convention of Human Rights and on its potential to support immigrant women's access to their rights and entitlements in conditions of equality.

An interaction between European human rights law and problematic norms of national immigration law from a gendered point of view has occurred on multiple occasions before the European Court of Human Rights. As a result, interesting perspectives have emerged with respect to immigrant women's enjoyment of both family life and employment. In the next sections I will address relevant judgments by the Strasbourg Court concerning issues of specific importance for immigrant women in relation to these fields. In particular, I will firstly examine selected judgments by the Strasbourg Court on two essential issues disproportionately affecting immigrant women and undermining their full and effective enjoyment of the right to family life as protected by the entire Convention, i.e., access to family reunification and freedom from domestic violence. Secondly, I will move on to examine relevant judgments of the Court on a matter of specific importance for immigrant women's enjoyment of their rights in the field of employment as outlined by the Convention, i.e., freedom from labour exploitation.

The aim of such an analysis is twofold. On the one hand, I plan to critically assess, through a human rights lens, the gender bias of the specific provisions of national immigration law called into question by the applicants in the examined cases before the Strasbourg Court. On the other hand, I aim to establish whether and to what extent the Court itself was able and willing to maximise the possible potential of European human rights law by performing an expansive reading of relevant provisions, in order to make up for the gendered shortcomings of the domestic legislation brought to its attention as well as affirm immigrant women's human rights to family and employment.

2. Immigrant Women and Family Life: Gendered Shortcomings of National Immigration Laws and Practices in the Light of the European Convention on Human Rights

In the field of family life, the gendered shortcomings of immigration regimes can be manifold. This paragraph will mainly focus on two of these shortcomings, respectively concerning immigrant women as sponsors of family reunification and as family members in the context of family reunification schemes. These two aspects have been selected not only because they constitute significant examples of the disparate impact that immigration law may produce on immigrant women, but also because on several occasions the European Court of Human Rights has established meaningful principles for both matters.

As for the first issue, it may be that certain legal prerequisites for the enjoyment of specific rights may disproportionately and negatively affect immigrant women due to their implicit focus on a male model of migrant or on gender stereotypes. More specifically, family reunification regimes may be based on a male breadwinner model⁵¹, or on internalised stereotypical views concerning immigrant women, which actually do not fit this diverse group. This issue may concern legal provisions *per se* but may also emerge in the context of implementation. As a consequence, the possibilities of immigrant women to access family reunification in conditions of equality with male immigrants are severely hampered. In this context, I will examine the judgments of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁵², *Haydarie v. the Netherlands*⁵³ as well as the Court's numerous decisions concerning transnational parents' access to family reunification.

The second matter that will be examined relates to the possibility that family migration regimes may fail to draw a connection between their provisions and issues that disproportionately affect immigrant women – thus failing to understand how such provisions may further aggravate them. In particular, it is crucial to consider that family migration regimes establishing a high degree of dependence of family members on sponsors may cause severe gender inequality within the family, with negative consequences for immigrant women specifically. A concrete example of such consequences, which I will discuss in order to

⁵¹ On the notion of the male breadwinner model, see LEWIS, J., 'Gender and the Development of Welfare Regimes', 2(3) *Journal of European Social Policy* (1992) 159. See also LEWIS, J., 'The Decline of the Male Breadwinner Model: the Implications for Work and Care', 8(2) *Social Politics* (2001) 152.

⁵² *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit.

⁵³ *Haydarie v. the Netherlands* (Third Section), application no. 8876/04, decision of 20 October 2005 (inadmissible).

illustrate this shortcoming, concerns the increased risk of domestic violence disproportionately experienced by family members – especially female spouses – and the reduced possibilities to react to such violence without jeopardising their residence rights. A critical analysis of the Court’s case law on domestic violence will thus be carried out in order to explore the possible role and potential of human rights in this area.

2.1. Immigrant Women’s Access to Family Reunification Before the European Court of Human Rights

The Strasbourg Court’s case law on third-country national’s access to family reunification is very rich and diverse. Among such case law, a specific group of judgments appears to be particularly important for our purposes due to its focus on immigrant women’s possibility to sponsor family reunification with their partners, spouses or children *vis-à-vis* restrictive norms of national immigration law. The importance of these judgments lies in the fact that the immigrant women involved were prevented from living with their family members in the host country because they had failed to comply with specific gendered notions of family roles and responsibilities underlying national provisions of family migration law. Thus, a key question that will be tackled when analysing these judgments will concern whether and to what extent the Strasbourg Court, through the lens of the human right to family life, was able to unveil the gendered effects of the immigration law norms brought to its attention. Even more importantly, I will enquire into whether the recalled human rights produced the effect of correcting the gendered shortcomings of such norms, and on their eventual limitations in this context.

With that in mind, I will critically assess three main examples of problematic norms of national immigration law brought before the Court by immigrant women who had been denied the possibility to sponsor family reunification with their spouses, partners or children – and thus to live together with such family members in their host countries.

a. *Abdulaziz, Cabales and Balkandali v. the United Kingdom: An Example of the Positive Influence of Human Rights on Biased Norms of Family Migration Law*

The first example concerns the dated but landmark case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*⁵⁴. Here, three immigrant women⁵⁵ legally residing in the United Kingdom had requested a leave to remain on the British territory on behalf of their non-citizen husbands for the purpose of family reunification. However, the British government rejected their requests on the basis of a law (the “Statement of Changes in Immigration Rules” of 20 February 1980) establishing specifically stricter conditions for the reunification of male immigrants with settled female spouses or fiancées. Similar strict conditions had not been introduced for the reunification of female immigrants with settled male spouses or fiancés.

It is crucial to highlight that the reason for such a differentiation mainly concerned the objective to protect the national labour market and discourage primary immigration, i.e., the entry and stay of foreigners who would pursue “full-time work in order to support a family”⁵⁶. In the British government’s view, men fit the latter category. Therefore, their entry and stay in the national territory had to be limited. Women, on the other hand, could still be freely admitted for the purpose of family reunification – provided that their marriage had not been contracted for the sole purpose of settlement – because of the Government’s “long-standing commitments (allegedly based on humanitarian, social and ethical reasons) to the reunification of the families of male immigrants”⁵⁷.

Arguably, such a legal system relied on a male breadwinner model. Indeed, the specific restriction against the entry of husbands or fiancés for the purpose of protecting the labour market explicitly targeted men rather than women because the British government expected immigrant men to be more likely than women to pursue an employed activity once admitted to the UK. On the other hand, such a policy implied that immigrant women were non-

⁵⁴ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit.

⁵⁵ Two of the applicants, Ms. Cabales and Ms. Balkandali, eventually obtained a leave to stay for their husbands because they had in the meantime acquired British citizenship. Indeed, Ms. Cabales had obtained naturalization as a British citizen, losing her Philippines citizenship, while Ms. Balkandali was eventually recognised as a British citizen on the basis of her previous marriage with a British citizen. However, for the purpose of this discussion I will not focus on this aspect because the eventual acquisition of British citizenship by these applicants is both irrelevant for their claims and beside the point of my argumentation. The relevant situation of the applicants, both for the purpose of my discussion and for the reasoning of the Court, is the one before the acquisition of citizenship, when their applications for reunification with their husbands were rejected. For these reasons, unless necessary I will refer to Ms. Cabales’ and Ms. Balkandali’s previous status of non-citizens.

⁵⁶ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., §21 and §75.

⁵⁷ *Ibid.*, §21.

threatening for the national labour market because they would rely on the work of their resident husband rather than pursuing access to the labour market once admitted.

Against the outlined British family migration regime, the applicants complained of a violation of their right to family life *ex art. 8* of the European Convention of Human Rights both taken alone and in conjunction with the prohibition of discrimination on the grounds of sex and race established by article 14 of the Convention. Among these claims, the lamented violation of article 8 in conjunction with article 14 is particularly meaningful. Indeed, this claim concerned the existence of “unjustified differences of treatment in securing the right to respect for [the applicants’] family life, based on sex, race, and also – in the case of Mrs. Balkandali – birth”⁵⁸.

As far as discrimination on the grounds of sex was concerned, the Court interestingly analysed the gendered assumptions underlying the British rules on family reunification and concerning the hypothetically different impact of immigrant men and women on the national labour market. In this respect, it emerged very clearly that Ms. Abdulaziz, Ms. Cabales and Ms. Balkandali embodied the living contradiction of the gendered assumption enshrined in the British rules on family reunification. In fact, their situations showed the great variety of living and working arrangements chosen by immigrant couples in the UK. Ms. Abdulaziz was an unemployed stateless person married to a Portuguese man who worked as a chef⁵⁹. Ms. Cabales, on the other hand, was a Philippine citizen who worked fulltime as a nurse and had an “established career”⁶⁰; the judgment does not clarify whether her husband worked at all. Lastly, Ms. Balkandali was an Egyptian citizen “with a high level of university education”⁶¹ who worked part time in a crèche while her Turkish husband worked fulltime and was pursuing a self-employed activity.

It was precisely the variety of the applicants’ situations as to the gendered divisions of labour within their couples that constituted the very core of their claim of discrimination. Indeed, the applicants held that the justification advanced by the British Government for its different treatment of settled women in comparison to settled migrant men “ignored the modern role of women”⁶². In its final assessment of the discriminatory character of the British rules on family reunification, the Court accepted the outdated and inexact nature of the

⁵⁸ *Ibid.*, § 70.

⁵⁹ It should be noted that Ms. Abdulaziz – originally from Malawi – had been discretionarily granted a permit for permanent residence for the precise reason that “she was an unmarried woman with little prospect of marriage” (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., § 39).

⁶⁰ *Ibid.*, § 44.

⁶¹ *Ibid.*, § 50.

⁶² *Ibid.*, § 75.

gendered assumptions underlying such rules, significantly stating that “the impact on the domestic labour market of women immigrants as compared with men ought not to be underestimated”⁶³, and that even before the introduction of the rules enforced on the applicants many immigrant wives were “economically active”⁶⁴. Therefore, the Court established that the differential treatment of men and women established by the discussed rules on family reunification was not justified by a significant differential impact of immigrant men and women on the national labour market, and recognised a violation of the applicant women’s right to enjoy their family life in conditions of non-discrimination on the grounds of sex.

The rejection by the Court of gendered and implicitly racialized assumptions concerning immigrant women is in my view a particularly important aspect of the *Abdulaziz* judgment. Indeed, the Court was not content with accepting the allegations of the Government concerning the hypothetical adherence of immigrant couples to the traditional distinction of productive work (assigned to men) and reproductive work (assigned to women). Instead, it observed that immigrant women also had a significant economic impact on the national labour market – despite mostly concentrating in part-time work. Especially in cases such as the one at issue, where alleged sex-based differences between immigrant men and women lead to a significant reduction of the legal recognition of the latter’s rights, a judicial willingness to contrast gendered assumptions by immigration law is crucial⁶⁵.

In sum, by relying on their human right to enjoy family life in conditions of non-discrimination on the grounds of sex, the applicant women were able to highlight and contradict the gendered assumptions made by the British Government concerning the roles, aspirations and expectations of men and women in immigrant communities in relation to work, family, and more generally the migration experience. As a result, the Strasbourg Court was prompted to acknowledge the gendered effects of such legal assumptions on immigrant women’s possibilities to enjoy family life with their husbands and partners in the United Kingdom, and to compensate for the national regime’s shortcomings by recognising a violation of articles 8 and 14 combined.

⁶³ *Ibid.*, § 79.

⁶⁴ *Id.*

⁶⁵ For a broader analysis of states’ argumentations based on gender stereotypes in judicial contexts, see COOK, R. J., and CUSACK, S., *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, Philadelphia, 2011, p. 123 ff.

As far as the other discussed grounds of discrimination are concerned, the Court was less responsive. This is particularly regrettable considering that the Court was requested by the applicant women to recognise an instance of multiple discrimination (on the grounds of sex, race and birth) stemming from national immigration rules, which – while common in practice – has rarely been brought to the Court’s attention⁶⁶. Firstly, the applicants complained that the British rules on family reunification, in addition to discriminating them on the grounds of sex, constituted an indirect and unjustified differential treatment on the grounds of race. Among other argumentations, the applicants claimed that the more favourable legal treatment reserved to settled immigrant wives born, or having a parent born, in the United Kingdom constituted a legal preferential treatment of “persons of a particular ethnic origin”⁶⁷. The Court, however, quickly dismissed such a claim by maintaining that these legal differentiations constituted “exceptions designed for the benefit of persons having close links with the United Kingdom, which do not affect the general tenor of the rules”⁶⁸. Moreover, Ms. Balkandali argued that the legal differentiation at issue constituted discrimination on the grounds of birth because it had neither objective nor reasonable justifications. Very interestingly, the Government replied to this claim by maintaining that “the difference in question was justified by the concern to avoid the hardship which women having close ties to the United Kingdom would encounter if, on marriage, they were obliged to move abroad in order to remain with their husbands”⁶⁹. Thus, the Court rejected Ms. Balkandali’s claim of discrimination on the grounds of birth by referring to unspecified “persuasive social reasons” as a justification for the preferential treatment reserved to people linked by birth to the state⁷⁰.

Thus, the Court’s assessment of the applicants’ claims of multiple discrimination produced mixed results from the point of view of immigrant women. Indeed, on the one hand it is in my view extremely appreciable that the Court was not content with recognising a violation of article 14 and article 8 on the exclusive grounds of sex, dismissing the other alleged grounds

⁶⁶ On this point see for instance ARNADÓTTIR, O. M., ‘Multidimensional Equality from Within: Themes from the European Convention on Human Rights’, in Schiek, D., and Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, New York, 2009.

⁶⁷ ECHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, cit., § 85(a).

⁶⁸ *Id.*

⁶⁹ *Ibid.*, §87.

⁷⁰ *Ibid.*, §88. The complete reasoning of the Court was: “The aim cited by the Government is unquestionably legitimate (...). It is true that a person who, like Ms. Balkandali, has been settled in a country for several years may also have formed close ties with it, even if he or she was not born there. Nevertheless, there are in general persuasive social reasons for giving special treatment to those whose link with a country stems from birth within it. The difference of treatment must therefore been regarded as having an objective and reasonable justification and, in particular, its results have not been shown to transgress the principle of proportionality.” In relation to this aspect, De Hart rightly observes that by accepting different treatment of different categories of insiders, the Court “accepted an implicit standard of ethnicity” (De Hart, ‘Love Thy Neighbour’, cit., p. 239).

of discrimination as absorbed by the former. Instead, the Court chose to analyse the other possible grounds of discrimination lamented by the applicants, i.e., race and birth. However, the final assessment by the Court in relation to these grounds of discrimination revealed to be disappointing not so much because of its result but rather because of the depth of the Court's analysis. Indeed, while in relation to the differential treatment on the basis of sex the Court looked at immigrant women's participation and position in the national labour market to contrast the Government's assumptions, the same cannot be said in relation to immigrant women's differential treatment in relation to birth. In fact, the Court uncritically endorsed the Government's view that simply by virtue of being born out of the host country, or even of not having parents born in the country, immigrant women would be more likely to be able to establish their family lives elsewhere regardless of the emotional and socio-economic ties developed in the host country. It seems therefore that although the Court was theoretically willing to consider multiple axes of discrimination against immigrant women, it was not equally attentive to their cumulative role in the discriminatory effects of the British rules at issue. In fact, the Court ended up endorsing questionable legal assumptions that constituted an additional axis of exclusion for immigrant women, denying the links built by the applicants with their host country.

b. *Haydarie v. the Netherlands*: When Human Rights Fail to Correct the Gender Bias of Family Migration Law

A second important case where a third-country national immigrant woman opposed biased norms of family reunification law that prevented her from sponsoring family reunification is *Haydarie v. the Netherlands*⁷¹. This case concerns the rejection of a refugee woman's⁷² application for family reunification with her children on the grounds of her failure to comply with the financial requirements established by Dutch family reunification law. Moreover, while such systems envisaged the possibility of being exempted from income requirements if

⁷¹ *Haydarie v. the Netherlands*, cit..

⁷² The applicants before the Court were an Afghan mother and her four children. After the disappearance of her husband, which was "likely after having been arrested by the Taliban", and after experiencing continuous harassment by this group, the applicant mother fled Afghanistan with one of her children and her disabled sister. She left her other three children in her country of origin in the care of her own father, and moved to Pakistan planning to have them join her as soon as possible. Subsequently, the applicant mother travelled to the Netherlands together with her son and her sister and applied for asylum. In the Netherlands, mother and son were granted a series of temporary permits. Two years after her first entry, the mother was authorised to work and she started attending sewing and language courses. Three years after their first entry, mother and son were granted a residence permit for the purpose of asylum; just one month after receiving the permit, the mother applied for family reunification with her three children left behind in Afghanistan.

aspiring sponsors could “demonstrate to have made, during a period of three years, serious but unsuccessful attempts to find gainful employment”, the applicant mother was not deemed to have done so.

In particular, the Dutch authorities rejected her application on the grounds that, as noted by the Dutch Minister of Foreign Affairs, “her sole income consisted of general welfare benefits whereas (...) benefits under the General Welfare Act are not accepted as constituting (part of the) means of subsistence within the meaning of the immigration rules”⁷³ and that it found “no special circumstances on the grounds of which it should be held that the aim served by the income requirement (...) entailed disproportionate consequences for the first applicants”⁷⁴. In fact, despite being authorised to work since two years after her first entry, the applicant mother had only attended sewing and language courses without actively seeking employment. Thus, in the Minister’s view the applicant mother had failed to make serious efforts to find employment, which would have required “an active attitude on her part, implying actively looking for and accepting work even where a job would not correspond to her education or professional experience, registering at an employment office (...) and interim employment agencies indicating to be willing to accept any kind of work, reacting to vacancy announcements, intensive writing of (un)solicited job applications, and undertaking labour-market oriented studies”⁷⁵.

However, the applicant mother’s allegations at the domestic level reveal a heavy burden of care responsibilities which hampered her access to the labour market. In particular, the applicant submitted that “she had to care for her wheelchair bound sister who refused aid from strangers and that she did not wish to leave her sister alone in the house fearing that she might cause a fire”⁷⁶.

In this light, the concrete situation of the applicant mother showed not only the unrealistic character of the Minister’s expectations towards foreign women with severe care burdens, but also a questionable view based on the identification of productive work as active and unpaid care work within the family as passive and inactive, as well as a problematic characterisation of care work as a consistently free choice rather than a responsibility. Such a regime was clearly based on a male breadwinner model, identifying the ideal and successful sponsor either with an immigrant worker earning enough to support himself and the family members by whom he wanted to be joined, or with an immigrant who had actively and consistently

⁷³ *Haydarie v. the Netherlands*, cit.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

pursued any kind of occupation in the labour market for at least three years. The Minister, indeed, significantly observed that “it was the [applicant mother’s] own choice to care for her sister”⁷⁷, and that “she could appeal to aid providing bodies”⁷⁸ to delegate her care work to others. Similar attitudes were also reproduced by the Regional Court of The Hague (to which the children of the applicant had turned), whose judgment concluded that Ms. Haydarie had “taken on the care for her disabled sister, which choice apparently entailed that she distanced herself from the labour market and thereby indirectly from her [three] children on account of failing to comply with the income requirement”⁷⁹.

Therefore, Ms. Haydarie and her children applied before the Strasbourg Court, lamenting a violation of their right to family life *ex* article 8 of the Convention. Interestingly, one of the argumentations set forth by the applicants under such a claim was that “the Netherlands authorities had given insufficient weight to her moral responsibility and unpaid care labour in respect of her sister”⁸⁰. This submission raised the important point that the State’s depiction of the applicant as jobless and inactive on the sole grounds of her lack of salary was strongly inaccurate. In fact, the applicant’s job was to fulfil her care responsibilities towards her sister.

Unfortunately, in the *Haydarie* case the Court was not as receptive to the deeply gendered discourse underlying the Dutch authorities’ decision as it was in the *Abdulaziz et al.* case with respect to the gendered assumptions of the British rules on family reunification. In the case at issue, the Court reproduced the exclusive focus of the national family reunification regime on productive work. In order to establish whether under such a system the applicant mother could have been exempted from complying with income requirements, the Court firstly affirmed that in principle it “[did] not consider unreasonable a requirement than an alien who seeks family reunion must demonstrate that he/she has a sufficient independent and lasting income, not being welfare benefits, to provide for the basic costs of subsistence of his or her family members with whom reunion is sought”⁸¹. Secondly, and even more interestingly, the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* This principle was subsequently reaffirmed by the Court in the case of *Konstantinov v. the Netherlands*, concerning the expulsion of a Serbian woman from the Netherlands on the grounds of her criminal record. While assessing the contextual refusal of the national authorities to grant her a residence permit on the basis of her marriage with a legally resident man because the latter did not satisfy the related income requirements, the Court reinstated that “[i]n principle, [it did] not consider unreasonable a requirement that an alien having achieved settled status in a Contracting State and who seeks family reunion there must demonstrate that he/she has sufficient and independent lasting income, not being welfare benefits, to provide for the basic costs

Court moved on to consider whether in the specific case at issue such a requirement was reasonable. In this respect, I am of the view that in this case the Court had a chance to take into consideration the specific situation of the applicant. In particular, it could have established that as an immigrant woman living alone with a young child and a disabled sister in a foreign country, and burdened with intensive care labour, the applicant mother could not have been reasonably expected to take up an additional occupation in order to satisfy the discussed income requirements.

However, the Court merely endorsed the Dutch Government's view whereby the applicant mother had simply chosen not to work and to take care of her sister instead – implying that her unpaid care labour was not actual work and she could have made efforts to find a “real” job. In particular, the Court stated that the applicant mother had not “actively sought gainful employment” and that “she preferred to care for her wheelchair bound sister at home”⁸². Moreover, the Court observed that it had not been demonstrated “that it would have been impossible for the [applicant mother] to call in and entrust the care for her sister to an agency providing care for handicapped persons”⁸³. On this basis, the Court concluded that the applicant mother's interest could not trump the state's interest in “controlling immigration and public expenditure”⁸⁴ and declared the case inadmissible.

While the Court's failure to recognise and contrast the gender bias of the Dutch rules on family reunification and of the Dutch authorities' decision is certainly disappointing, it is important to observe that no related claim was brought under the right to non-discrimination established by art. 14. In particular, Ms. Haydarie could have relied on articles 8 and 14 combined to highlight the gender bias of the Dutch norms at issue in order to prompt an assessment by the Strasbourg Court similar to that of *Abdulaziz et al.* It is reasonable to imagine that the applicant mother may have had a successful argumentation under these articles, shining a light on the disproportionate difficulties for a third-country national woman with no family network to rely on in the host country, as well as serious and burdensome care responsibilities, to take up employment in order to satisfy the income requirements established by the national family reunification regime. This could have encouraged the Court to recognise the indirectly discriminatory effects of the abstract model of “desirable sponsor”

of subsistence of his or her family members with whom reunion is sought” (*Konstantinov v. the Netherlands*, Third Section, application no. 16351/03, judgment of 26 April 2007, §50).

⁸² *Haydarie v. the Netherlands*, cit.

⁸³ *Id.*

⁸⁴ *Id.*

underlying the discussed norms in relation to immigrant women's enjoyment of their right to family life.

This framing, in particular, could have prompted a different judicial assessment of the reasonableness of the prerequisites imposed by Dutch family reunification law and therefore of the fairness of the balance realised by the Dutch authorities between the state interest to ensure that immigrants entering the country for the purpose of family reunification would not rely on the national social assistance system, on the one hand, and immigrant women's interest to enjoy family life in the host country in conditions of equality and non-discrimination on the grounds of sex. Indeed, had the Court considered the gendered implications of the national authorities' orientation, the substantial unreasonableness of imposing requisites exclusively based on productive work to an immigrant woman burdened by unpaid care labour and the objective impossibility for her to satisfy the income requirements at issue may have emerged in its assessment of whether such requirements were "reasonable in the instant case"⁸⁵, revealing the disparate impact of this norm.

c. Transnational Mothers' Access to Family Reunification With Their Children: the Dangerous Endorsement by the Strasbourg Court of a Gendered "Good Mother" Narrative

Contrary to the judicial examples discussed so far, which relate to gendered shortcomings underlying the very formulation of legal norms, the case law that will be examined in this section illustrates how a disparate impact on immigrant women's rights in the field of family life may also be produced by the implementation of certain norms. This case law originated from the exclusion of certain immigrant parents from the possibility to sponsor family reunification with their children, on the grounds of the 1994 Dutch Aliens Act (*Vreemdelingenwet 1994*). Chapter B1 of the related Aliens Act Implementation Guidelines (*Vreemdelingendecirculaire 1994*), only allowed entry for the purpose of family reunification to children "actually belonging to the family unit" (*feitelijk behoren tot het gezin*). Recalling this norm, the Dutch authorities had rejected the applicant parents' requests for family reunification on the grounds that the family ties between them and their children had ceased to exist.

⁸⁵ *Id.*

The involved provisions of Dutch law did not appear to reveal any gendered shortcoming. In fact, these provisions appeared to negatively affect both men and women equally. It has been rightly noted that through the establishment of the criterion of effective belonging to the family unity, Dutch immigration law required national authorities to “[police] the actual involvement of parents in the care of their children”⁸⁶ and imposed an abstract model of an ideal parent. This corresponded to a broader evolution in Dutch society. Indeed, while the idea of a legal assessment of the actual care provided to children as a criterion for Dutch parents’ access to parental rights was firmly rejected, it was at the same time accepted and implemented in the national family reunification regime⁸⁷.

However, a parallel contradiction observable in Dutch society concerned immigrant women specifically: single motherhood was increasingly accepted as a sign of emancipation for Dutch women but was seen as an indication of immorality and irresponsibility for migrant mothers⁸⁸. These two tendencies suggested the risk of a severely biased implementation of the legislation at issue to the detriment of immigrant women. The assessment of the persistence of actual family ties – implying a close scrutiny of the actual involvement of transnational parents in their children’s care – could be heavily and negatively influenced by the gendered and racialized reproach of single immigrant mothers. As a consequence, immigrant single mothers risked being disproportionately hampered in their prospects of enjoying family life with their children in their host country.

Therefore, an important question concerns whether and to what extent the human rights framework of the Convention was capable of steering state practice towards a gender-sensitive implementation of the norms at issue. A significant number of transnational parents turned to the Strasbourg Court after being denied family reunification with their children by the Dutch authorities on the grounds of allegedly broken family ties, lamenting violations of art. 8 of the Convention. The resulting case law offers interesting cues to answer this question.

Thus, I will now turn to critically examine and compare two main groups of cases⁸⁹. The first group concerns applications brought before the Court by single migrant mothers whose access to family reunification with their children had been denied by the Dutch authorities on the

⁸⁶ VAN WALSUM, S., ‘Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life’, 11 *European Journal of Migration and Law* (2009) 295, p. 299.

⁸⁷ *Ibid.*, pp. 208 – 299.

⁸⁸ *Ibid.*, pp. 299 – 300.

⁸⁹ In order to effectively expose the gendered implications underlying this case law – and to compare the situation and legal treatment of the immigrant women and men involved – I have focused on decisions concerning single parents, setting aside those concerning applicant couples.

grounds of an alleged severance of the family ties between them and their children left behind in their host country. Such a group includes the cases of *Knel and Veira v. the Netherlands*⁹⁰, *P.R. v. the Netherlands*⁹¹, *I.M. v. the Netherlands*⁹², *Chandra v. the Netherlands*⁹³, *Ramos Andrade v. the Netherlands*⁹⁴, and *Benamar v. the Netherlands*⁹⁵. The second group involves single migrant fathers in the same situation, and includes the cases of *Ahmut v. the Netherlands*⁹⁶, *Mensah v. the Netherlands*⁹⁷, *Lahnifi v. the Netherlands*⁹⁸, and *Adnane v. the Netherlands*⁹⁹.

In a comparative perspective, it must be noted that while all of the cases on migrant single parents concerned men and women in very similar situations¹⁰⁰, and all of the applications were deemed inadmissible by the Court regardless of the sex of the applicant parents, clearly gendered subtexts emerged from the Court's judicial reasoning. Indeed, not only did the Court fail to consider the possibly biased implementation of the family reunification regime at issue by the national authorities, and the possibly gendered effects of state practice, but its own attitude towards the applicant single parents also varied significantly depending on the sex of the latter. Three main aspects of the Court's decisions in this field strongly point towards this conclusion: the Court's assessment of the single parents' decision to emigrate while leaving their children behind in their country of origin, the involved children's need of care, and the parents' realistic options of going back to their country of origin in order to enjoy family life

⁹⁰ *Knel and Veira v. the Netherlands* (First Section), application no. 39003/97, decision of 5 September 2000 (inadmissible).

⁹¹ *P.R. v. the Netherlands* (First Section), application no. 39391/98, decision of 7 November 2000 (inadmissible).

⁹² *I.M. v. the Netherlands* (Second Section), application no. 41226/98, decision of 25 March 2003 (inadmissible).

⁹³ *Chandra and Others v. the Netherlands* (Second Section), application no. 53102/99, decision of 13 May 2003 (inadmissible).

⁹⁴ *Ramos Andrade v. the Netherlands* (Second Section), application no. 53675/00, decision of 6 July 2004.

⁹⁵ *Benamar and Others v. the Netherlands* (Third Section), application no. 43786/04, decision of 5 April 2005 (inadmissible).

⁹⁶ *Ahmut v the Netherlands*, cit.

⁹⁷ *Mensah v. the Netherlands* (First Section), application no. 47042/99, decision of 9 October 2001 (inadmissible).

⁹⁸ *Lahnifi v. the Netherlands* (First Section) application no. 39329/98, decision of 13 February 2001 (inadmissible).

⁹⁹ *Adnane v. the Netherlands* (Second Section) application no. 50568/99, decision of 6 November 2001 (inadmissible).

¹⁰⁰ All of the applicant parents had emigrated to the Netherlands leaving their children behind in their country of origin in the care of relatives or friends, at a time when they were no longer married or in a relationship with the other parent of their children. In all of the cases at issue, the applicant single parents had pursued other relationships in the Netherlands while staying involved in their children's care and upbringing through different strategies and in different ways. At one point or another of their stay, the single parents in question had applied to have their children join them in the Netherlands, but all of their applications had been rejected by the Dutch authorities on the grounds of the parents' alleged failure to maintain family ties alive with their children left behind in their countries of origin.

with their children there instead that in the host country. In each of these evaluations, the Court revealed a problematic, gendered view of parental responsibilities.

Firstly, while the Court's assessment of migrant single fathers' decision to leave their children behind consisted in quite neutral statements for men, immigrant single mothers' decisions in this sense were much more detailed – specifically focusing on the presence of a new partner in the Netherlands as the reason for their emigration¹⁰¹, on the eventual unwillingness of a new partner to live with the applicants' children as a reason for the postponement of reunification, and on the age of the children at the moment of the mothers' emigration. All of these factual aspects, despite also being present in the cases concerning single migrant fathers, were exclusively highlighted in relation to immigrant single mothers¹⁰². In this respect, it must also be noted that the eventual opposition of the migrant mothers' new partners to the reunification with their children was the only reason on which the Court focused among the many other justifications raised by the applicant mothers – while for migrant fathers the Court appeared more willing to consider the whole set of justifications submitted by the applicants¹⁰³.

Secondly, the involved children's need of care was assessed in very different terms by the Court depending on the sex of the applicant single parent. In particular, despite the fact that all of the applicants' children were in the same age range, the Court used this aspect as a

¹⁰¹ Only in the case of *Mensah* (cit.), where the applicant had married three times before applying for family reunification, did the Court reprehend a father for migrating and then staying in the host country and pursuing another relationship instead of staying in or returning to his country of origin.

¹⁰² In cases concerning single migrant fathers, the Court simply observed that the applicants had left the children behind of their own free will, and that their separation from their children was ultimately imputable to such a choice. While negatively affecting the final assessment of the Court, such statements cannot remotely be compared to the Court's framing of single migrant mothers' decisions to emigrate. Just by way of example, I shall compare the Court's statements in the case of *Ahmut* (cit., § 70), whereby "[the] fact of the applicants' living apart is the result of [the father's] conscious decision to settle in the Netherlands rather than remain in Morocco", with that in the case of *I.M.* (cit.), where the Court observed that "[when] the applicant left the Cape Verde Islands in November 1986 to settle, marry and start a new family in the Netherlands, she decided voluntarily to leave S., who was 20 months' old at the time and completely dependent on others" and that "[she] went along with her new husband's wishes to the effect that S. should not come to the Netherlands to form part of their new family unit".

¹⁰³ In all of the cases concerning migrant mothers, the applicants submitted a wide range of reasons for their postponement of family reunification, mostly related to their efforts to create the conditions that would satisfy the national requirements for family reunification – ranging from finding suitable accommodation and satisfying income requirements, to preparing the necessary documentation. Nonetheless, the Court showed a consistent indifference towards such justifications, effectively ignoring them and focusing exclusively on the mothers' eventual compliance to their new partners' unwillingness to live with their children in the host country. In the case of *Ramos Andrade* (cit.), for instance, the Court completely overlooked the mother's allegations as to why she had not immediately pursued family reunification and merely observed that although she never planned to be permanently separated from her daughters "she nevertheless accepted to stay with her partner in the Netherlands even though, according to what her partner had told her, this meant that she could not be reunited with her children".

justification for the inadmissibility of their claims exclusively in relation to immigrant mothers – arguing that by the time the national authorities had taken a final decision on their application for family reunification, the children had reached an age where they were “not as much in need of care as younger children”¹⁰⁴ – while disregarding this issue entirely for immigrant fathers.

Thirdly, the Court’s evaluation of the options left to the migrant single parents after the rejection of their applications for family reunification was also very different depending on the sex of the parents. On a broad level, despite the high degree of settlement of the involved parents in the case law at issue¹⁰⁵, the Court consistently decided for the inadmissibility of their plights on the grounds that no obstacles to developing their family life in their countries of origin had been shown¹⁰⁶. Despite this homogeneous rejection of the parents’ applications, it must be noted that in at least two cases concerning migrant single fathers the Court accepted in principle that “in cases where a parent has achieved settled status in a country and wants to be reunited with her or his children who, for the time being, have been left behind in their country of origin, it may be unreasonable to give the parent the choice between giving up the position which she/he has acquired in the country of settlement or to renounce the mutual enjoyment by parent and child of each other’s company which constitutes a fundamental element of family life”¹⁰⁷. However, despite the absolute similarity of the mothers’ and fathers’ situations in terms of settlement and integration in their host countries, none of the Court’s decisions on migrant mothers involved similar statements. Instead, the Court further reaffirmed such a principle in a subsequent decision concerning, once again, a migrant single father¹⁰⁸.

Against this background, a comparative analysis of the Court’s decisions on migrant single mothers and fathers reveals seriously gendered shortcomings of the Court’s own judicial reasoning, which undermined its possibilities of promoting a gender-sensitive implementation of the national immigration regime in question. Instead, the choices of the Courts in terms of an exclusive focus on certain aspects of the experience of immigrant mothers – while focusing

¹⁰⁴ See *I.M. v. the Netherlands*, cit., *Knel and Veira v. the Netherlands*, cit., *Chandra v. the Netherlands*, cit., and *Benamar v. the Netherlands*, cit.

¹⁰⁵ All of the applicant parents were settled immigrants, and all of them – except for the migrant mother in *Benamar* – had acquired Dutch citizenship.

¹⁰⁶ It should be clarified that despite the fact that most of the applicants had acquired Dutch citizenship, the Court could well consider the possibility for the applicants to enjoy family life in their countries of origin because they had nonetheless maintained the citizenship of such countries, acquiring double citizenship, and thus – at least from a legal point of view – they could easily move back to these countries.

¹⁰⁷ See *Lahnifi v. the Netherlands*, cit., *Adnane v. the Netherlands*, cit.

¹⁰⁸ *Magoke v. Sweden* (Second Section), application no. 12611/03, decision of 14 June 2005 (inadmissible).

on others for immigrant fathers—suggests that the Court implicitly embraced and enforced an abstract and gendered model of ideal motherhood that had no equivalent for migrant fathers. In particular, the focus on the age of the children and on the “competing” presence of a new partner in the migrant mothers’ lives suggests that such a model relied on physical proximity and absolute emotional devotion to their children as indicators of a “real” family relationship between mother and child. The resulting “good mother” model was that of a mother physically close to her children throughout their entire childhood (which denied the possibility of leaving young children behind in the country of origin) and exclusively devoted to them from an emotional point of view (with the consequent censure of eventual relationships with new partners in the host country). A similar model is also suggested by the exclusive mention in cases of migrant fathers of the possible unreasonableness of forcing a migrant parent to choose between giving up his or her settled position in the host country and relinquishing living with his or her children for good. In the spirit of utter self-abnegation, the “good mother” could instead be reasonably asked to leave the country where she had settled and sacrifice her position in order to return to her country of origin if she really wanted to enjoy family life with her children.

While the Court deemed inadmissible the claims of migrant fathers and mothers alike, the adoption of such an abstract model of “proper” mothering, but not of fathering, is significant in itself because it undermines the Court’s ability to offer key guidelines to state practice in order to avoid a biased implementation of family reunification regimes. Furthermore, the Court’s adoption of such a model in itself creates a double standard at the European level concerning migrant mothers’ and fathers’ access to family reunification with their children, at the disadvantage of the former.

These observations on the Court’s insensitivity to the risk of deeply gendered effects of the norms in question do not appear applicable to its more recent judgment of *Tuquabo-Tekle v. the Netherlands*¹⁰⁹. This case concerned the rejection of a single migrant mother’s application for family reunification with her child on the grounds that she had failed to maintain family ties with her daughter. In its judgment, the Court avoided replicating the observed features of its previous case law concerning single migrant mothers, and recognised – for the first time in this field – a violation of a single mother’s right to family life under article 8 of the

¹⁰⁹ *Tuquabo-Tekle and Others v. the Netherlands* (Third Section), application no. 60665/00, judgment of 1 December 2005.

Convention. For the purpose of this section, the Court's apparent departure from its usual attitude towards migrant single mothers is particularly interesting

In the *Tuquabo-Tekle* case, several aspects suggest that the Court abandoned its usual focus on certain features of migrant mothers' emigration – which were consistently overlooked for migrant fathers. For instance, in this case the Court made no mention whatsoever of the age of the involved child at the moment of her mother's emigration, nor of the child's need of care as a ground for the evaluation of the opportunity of family reunification. Similarly, the applicant mother's relationship with another man in the host country was not penalised as in previous cases. Furthermore, in this judgment for the first time the Court not only explicitly acknowledged a single mother's allegations of the reasons that caused her belated application for family reunification, but it even deemed them to be reasonably justified. Indeed, it concluded that the national authorities had "failed to strike a fair balance between the applicants' interests on the one hand and [their] own interest in controlling immigration on the other"¹¹⁰, since the applicant mother's efforts to reunite with her daughter had failed because of "circumstances beyond her control"¹¹¹ and therefore the applicant mother had "always intended for her daughter to join her"¹¹².

However, a closer look at this judgment reveals that the Court's deviation from its usual reasoning did not entail an overcoming of the abstract and gendered notions of motherhood embraced in its previous case law. In fact, the different assessment of the applicant mother's situation confirms the reproduction of such gendered narratives. It should be noted that the concrete situation of the applicant did not leave much room for any other framing. The circumstances of the mother's emigration in this case were substantially different from those of the other applicant mothers in the cases examined so far. In particular, Ms. Tuquabo-Tekle had escaped the civil war in Ethiopia following the death of her husband and her own harassment and detention due to her husband's involvement in the Eritrean People's

¹¹⁰ *Ibid.*, § 52.

¹¹¹ *Ibid.*, § 45.

¹¹² *Id.* The circumstances to which the Court referred concerned the fact that the applicant mother had left Ethiopia for Norway leaving her children in the care of an uncle and their grandmother, but when she had obtained leave for family reunification with her children "it did not prove possible (...) to procure the departure of the other children from Eritrea" (*Ibid.*, § 9). Moreover, the Court observed that while the applicant mother and her second husband had made a delayed application for family reunification, they had done so in order to take steps that they deemed necessary for this purpose (i.e., they had applied for a passport on behalf of her daughter and had made efforts to find suitable housing). Thus, "any delays which occurred stemmed from the applicants' sincerely held belief – in which they were apparently supported by their legal representative – that it was not possible to apply for family reunion in the Netherlands until these matters had been taken care of rather than from any decision on their part that [their daughter and step-daughter] should stay in Eritrea" (*Ibid.*, 46).

Liberation Front. Moreover, as soon as she had obtained a permit for humanitarian reasons she had applied for family reunification with her children. The difficulties in having her daughter join her were due to the fact that the latter's place of residence had become part of the new State of Eritrea, where contacts and the issuing of documentation were initially impossible to obtain. Lastly, she had met her new partner (her second husband) only after applying for family reunification with her children left behind.

Against this background, it appears clearly that the applicant mother in this case complied with the abstract model of "good mother" which underlay the Court's previous case law. Arguably, her lack of free choice as to the end of her marriage with the father of her children, her emigration and her consequent separation from her daughter allowed her to fit the gendered narrative of the Court, which identified motherhood with features such as a continuous physical proximity (or at least a continuous desire and effort in this respect) and total emotional devotion towards one's children.

Therefore, the *Tuquabo-Tekle* judgment does not actually suggest an evolution of the Court towards a more gender-sensitive assessment of migrant parents' exclusion from the possibility to sponsor family reunification with their children. Rather, it confirms the existence of a double standard underlying the Strasbourg Court's case law on this matter, in my view due to an unconscious internalisation and reproduction of gendered tropes concerning motherhood. The higher standards implicitly imposed on migrant mothers by the Court as to their possibilities to effectively enjoy family life with their children in their host countries, therefore, seriously undermined its capability to enforce a gender-sensitive implementation of the discussed norms on the grounds of the human rights enshrined in the Convention.

In this respect, a reading of the right to family life *ex art.8* in the light of the anti-discrimination mandate of art. 14 appears utterly necessary to push the Court towards a reflection on the disparate impact that its own judgments may generate on immigrant women – in this case by imposing additional "good mother" prerequisites on them for the purpose of accessing family reunification which have no equivalent for fathers. These additional requirements, indeed, *de facto* undermine immigrant women's access to their right to family life in conditions of equality and non-discrimination with immigrant men.

d. Legal Enforcement of Gendered Models and its Disparate Impact on Immigrant Women

The judgments examined in this section constitute significant examples of how the internalisation and enforcement of deeply gendered models on immigrant women may significantly hamper their access to rights which are in theory recognised to them on an equal footing with immigrant men. The matter of sponsoring family reunification is one of the areas in which this problem emerges, especially because such models often rely on stereotypical assumptions concerning the role of women within the family. In the cases of *Abdulaziz et al.*¹¹³ and of *Haydarie*¹¹⁴, a disparate impact on the involved immigrant women's family life was produced because of the adherence of national norms to a breadwinner model. In the Strasbourg Court's case law on transnational mothers, a similar effect was generated due to the Court's adherence to an abstract and unviable "good mother" model.

Regrettably, the role played by human rights law in these instances was far from positive. With the important exception of *Abdulaziz et al.*, the Court interpreted the right to family life *ex art. 8* as a ground to endorse these models, reproducing their entrenched gender bias at the supranational level. The result, in my view, was one of indirect discrimination against the involved immigrant women in respect to their possibilities to access family reunification. This is also suggested by the outcome of the *Abdulaziz et al.* judgment. It is no coincidence that the only judgment where the Court recognised and corrected the perverse effects of a gendered model adopted by national norms was the one where a claim of sex discrimination under art. 14 of the Convention was submitted. This claim, indeed, encouraged the Court to delve into the justifications advanced by the British authorities for establishing rules whereby "it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement"¹¹⁵. This focus, in turn, pushed the Court to pay attention to the breadwinner model that grounded these norms, and to compare their stereotypical normative view with the reality of immigrant women in the United Kingdom. Because it found a deep discrepancy between the two, the Court ultimately concluded that the breadwinner model enforced by British law did not constitute a reasonable and objective justification precisely because it relied on an outdated view of immigrant women's role in the national society and labour market.

¹¹³ *Abdulaziz, Cabales and Balkandali*, cit.

¹¹⁴ *Haydarie*, cit.

¹¹⁵ *Abdulaziz, Cabales and Balkandali*, cit., § 74.

These observations suggest two main conclusions. Firstly, that human rights norms *per se* are neither inherently harmful nor biased, nor automatically beneficial for immigrant women. As shown with particular clarity by the Court's case law on transnational parents, and by the Court's focus on different aspects depending on the sex of the parent, human rights norms may reproduce or correct the gender bias entrenched in national legal systems depending on how they are interpreted by competent courts.

Secondly, a consideration of the right to family life in conjunction with the prohibition of discrimination on the grounds of sex appears essential to move towards a judicial recognition of the direct or indirect discrimination stemming from the adoption of gendered models by national legal regimes applicable to immigrant women. I am of the view that raising claims of violation of arts. 8 and 14 jointly can constitute an effective legal strategy to push the European Court of Human Rights to unveil and correct the disparate impact of these models on immigrant women's access to family reunification, and family life in general.

In relation to this, it must be noted that the European Court of Human Rights has so far interpreted art. 14 as entailing a prohibition of both direct and indirect discrimination¹¹⁶. Arguably, the latter appears particularly important for immigrant women. Domestic norms such as that chastised by the Court in *Abdulaziz et al.*, which explicitly differentiate between men and women without a reasonable and objective justification, and thus produce direct discrimination, are indeed a rare occurrence. As suggested by the other judgments discussed in this section, the majority of norms undermining immigrant women's rights in the fields of family life and employment do so because, despite their apparent neutrality, they disproportionately and negatively affect this group – resulting in indirect discrimination. For this reason, the relatively recent attention of the Strasbourg Court towards indirect discrimination and substantial equality constitutes a particularly important development for

¹¹⁶ In the case of *Hugh Jordan v. the United Kingdom* (Third Section, application no. 24746/94, judgment of 4 May 2001), the Court established that "where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group" (*Ibid.*, § 154). This principle was further reaffirmed in *Hoogendijk v. the Netherlands* (First Section), application no. 58641/00, judgment of 6 January 2005, where the Court also showed openness to the use of statistics to prove indirect discrimination. The analysis of claims of indirect discrimination under the scope of art. 14 more recently occurred in the judgments of *D.H. and others v. the Czech Republic* (Grand Chamber), application no. 57325/00, judgment of 13 November 2007; *Oršuš and others v. Croatia* (Grand Chamber), application no. 15766/03, judgment of 16 March 2010; *Horvát and Kiss v. Hungary* (Second Section), application no. 11146/11, judgment of 29 January 2013; *S.A.S. v. France* (Grand Chamber), application no. 43835/11, judgment of 1 July 2014. On the matter, see also GERARDS, J., 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', 13 *Human Rights Law Review* (2013) 99.

immigrant women, and should in my view be further encouraged through judicial claims in this sense.

2.2. Freedom from Domestic Violence under the European Convention: Towards Common Standards for National Migration Regimes?

Especially starting from the *Kontrová* case of 2007¹¹⁷, the European Court of Human Rights has established and consolidated important principles on human rights violations related to domestic violence and on state obligations in relation to this phenomenon. Because of the “particular risk from domestic violence” experienced by immigrant women¹¹⁸, the recent attention of the Court towards this phenomenon might constitute in itself a particularly positive development for this group. In this respect, it appears important to consider the effects of the principles established by the Court in this field on national migration regimes, and especially on the creation and implementation of domestic rules on family migration. In connection with this matter, the Council of Europe’s Committee on Equal Opportunities noted in 2009¹¹⁹ how the disproportionate risk of domestic violence run by immigrant women in the European legal space was not only imputable to factual triggers – such as their cultural background, the patriarchal mentality of their communities, language barriers, gender-based discrimination, stereotypes and so forth – but also by specific legal barriers imposed by national family reunification regimes. In particular, the Committee highlighted the problematic and perverse effects of family reunification schemes that impose the dependence of authorisations to stay and reside in the host country from the spouse’s permit. As a result of this dependence, “[making] a complaint and/or seeking divorce on the ground of violent acts signifies, in this case, a highly probable return to the country of origin and/or rejection by their own family”¹²⁰. The Committee rightly observed how “[this] situation places many migrant women subjected to domestic violence at a disadvantage, often deterring them from making a complaint against a violent partner or spouse”¹²¹.

Arguably, the dependence of the family members’ residence permit on that of the spouse in the context of family reunification regimes disproportionately and negatively affects women’s

¹¹⁷ *Kontrová v. Slovakia*, cit.

¹¹⁸ Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, cit.

¹¹⁹ Parliamentary Assembly of the Council of Europe, Committee on Equal Opportunities for Women and Men, Report on *Migrant Women: at Particular Risk from Domestic Violence*, cit.

¹²⁰ *Ibid.*, § 9.

¹²¹ *Ibid.*, § 10.

possibilities to react to phenomena of domestic violence. Not only do such phenomena disproportionately affect women more than men, but women are also mostly prevalent in family migration fluxes towards Europe. Thus, immigrant women victims of domestic violence holding a permit for the purpose of family reunification are forced by such a legally-endorsed dependence to choose between jeopardising their possibility to stay in the host country and enduring domestic violence. With respect to the possible solutions to this issue, it is extremely significant that the Committee was not content with recommending the state parties envisage an independent permit for migrant women victims of domestic violence. In fact, the Committee commented on the limited effectiveness of such a legal solution, “considering the covert nature of domestic violence and the linguistic, financial and sometimes administrative difficulties, ignorance of these measures or family coercion if steps are taken”¹²², and concluded that “it seems indispensable for migrant women to be promptly granted an independent status in their own right”¹²³. Accordingly, in the final text of its Resolution 1697(2009), the Council of Europe recommended that member States grant an “individual legal status to migrant women who have joined their spouse through family reunion, if possible within one year of the date of arrival”¹²⁴.

On a broader level, I would also argue that in addition to constituting a more effective measure against domestic violence, the granting of an independent status in the context of family reunification schemes beyond “extreme” situations such as spousal abuse, divorce, widowhood and so forth, would greatly benefit immigrant women by promoting spousal equality. At the very least, it would avoid pushing this category towards subordination and dependence on their spouses by aggravating and adding up to factual difficulties such as language barriers, lack of knowledge of the host society and its laws, and so forth.

In the light of these observations, in this section I aim to critically assess the Strasbourg Court’s case law on domestic violence in order to understand whether and to what extent the principles established by the Court in this context may fruitfully apply to national family reunification regimes. In this respect, it must be first clarified that the Court’s judgments on the issue of domestic violence to date have never involved an immigrant woman. Consequently, the case law on the specific matter of domestic violence has never directly tackled national immigration regimes. Nevertheless, such a case law is still important for our

¹²² *Ibid.*, § 17.

¹²³ *Id.*

¹²⁴ Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, cit., § 4.1.1.

purposes. In its judgments on domestic violence, indeed, the Court has established key principles concerning positive and negative state obligations whose scope of application goes well beyond the specific domestic legislation examined in each case. In the next section, I will clarify this point and explain why, in my view, the principles established by the Strasbourg Court on this matter are in fact very relevant for immigrant women's freedom from domestic violence.

a. The European Court of Human Rights' Case Law on Domestic Violence: Extracting Relevant Principles from Multiple Human Rights Under the Convention

The Strasbourg Court's case law on domestic violence can be divided into two groups. A first group of judgments concerns cases of domestic violence that eventually culminated in the victim's murder at the hands of the violent partner. In such cases the Court was mainly submitted with claims of violations of the victim's right to life established by article 2 of the Convention. In a second group of judgments, the Court analysed claims of human rights violations brought by victims of domestic violence themselves. In particular, in this second group, the applicant women mostly relied on the prohibition of torture ex article 3 of the Convention and on their right to respect for private and family life under article 8, both taken alone or in conjunction with their right to non-discrimination on the grounds of sex pursuant article 14.

As far as the first group of judgments is concerned, the cases of *Kontrová v. Slovakia*¹²⁵, *Branko Tomašić and Others v. Croatia*¹²⁶ and *Opuz v. Turkey*¹²⁷, all involved claims of violations of the right to life of persons killed in the context of abusive relationships or households. More specifically, in the case of *Kontrová* and *Opuz* the applicant women were both victims of severe psychological and physical abuse by their spouse, which had resulted in the murder of their children and mother respectively. In the case of *Branko Tomašić*, the severe psychological abuse perpetrated by a male spouse had soon evolved in death threats and in the eventual murder of his former wife and their child. In all three judgments, the Court recognised a breach of the right to life of the victims by the respondent states on the basis of their failure to set up an effective system of protection. Moreover, in these judgments the

¹²⁵ *Kontrová v. Slovakia*, cit.

¹²⁶ *Branko Tomašić and Others v. Croatia*, cit.

¹²⁷ *Opuz v. Turkey*, cit. The *Opuz* case will also be discussed in the context of the second group of judgments because the applicant complained of both a violation of her deceased mother's right to life and a violation of her own right to live free of torture ex article 3 of the Convention.

Court established a first important principle with respect to state obligations in relation to the right to life enshrined in article 2 of the Convention. Indeed, the Court stated that article 2 entails not only negative state obligations, i.e., an obligation to abstain from unlawfully taking the life of individuals, but also positive obligations of protection, consisting in “a primary duty on the State to secure the right to life by putting in place *effective criminal-law provisions* to deter the commission of offences against the person *backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions* [emphasis added]”¹²⁸.

In the second group of judgments, the Court looked more closely at the phenomenon of domestic violence as a form of violation of different articles of the Convention. In this second group of cases, the women victims of domestic violence directly applied before the Court in order to obtain recognition of breaches of their own human rights in direct connection with their experiences of abuse. The judgments of *Bevacqua v. Bulgaria*¹²⁹, *Opuz v. Turkey*¹³⁰, *E. S. and Others v Slovakia*¹³¹, *A. v. Croatia*¹³² and *Valiulienė v. Lithuania*¹³³ can all be ascribed to such a group.

In all of these cases, the applicant women complained before the Strasbourg Court that the national authorities of their states had breached several articles of the Convention by failing to effectively protect them against domestic violence. Depending on the seriousness and intensity of the violence suffered by the applicants, the Court analysed their claims in the context of the right not to be subjected to torture or to inhuman or degrading treatment ex article 3 of the Convention or in the context of the right to respect of private and family life pursuant article 8. Moreover, in the case of *Opuz*, the Court also engaged in a compelling analysis of domestic violence as a form of discrimination on the grounds of sex and prohibited as such under article 14 of the Convention. Among the many important aspects touched upon by the Court in the judgments at issue, I will highlight two points that I find particularly relevant for the purpose of extracting useful principles for immigrant women specifically.

¹²⁸ See *Kontrová v. Slovakia*, cit., §49, *Branko Tomašić and Others v. Croatia*, cit., §49, and *Opuz v. Turkey*, cit., §128.

¹²⁹ *Bevacqua v. Bulgaria*, cit.

¹³⁰ *Opuz v. Turkey*, cit.

¹³¹ *E.S. and Others v. Slovakia*, cit.

¹³² *A. v. Croatia*, cit.

¹³³ *Valiulienė v. Lithuania*, cit.

Firstly, in the case law at issue the Court established important principles concerning state obligations in preventing and suppressing domestic violence, under articles 3 and 8 of the Convention in particular. More specifically, in the *Bevacqua* judgment the Court recalled that “the authorities’ positive obligations – in some cases under Articles 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”¹³⁴, emphasising also “the particular vulnerability of the victims of domestic violence and the need for active State involvement in their protection”¹³⁵. The existence of state obligations to take effective measures and adopt an adequate legal framework for protecting individuals against private acts of violence was consistently reaffirmed in the subsequent judgments by the Court on domestic violence. In *Opuz v. Turkey*, the Court established that the prohibition of torture and inhuman or degrading treatment under article 3 “requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals”¹³⁶, requiring “effective deterrence against such serious breaches of personal integrity”¹³⁷. In *A. v. Croatia*, the Court affirmed that the right to respect for private life enshrined in article 8 also implies states’ “duty to protect the physical and moral integrity of an individual from other persons”¹³⁸, and that “[to] that end they are to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”¹³⁹.

In relation to states’ positive obligations to protect individuals against domestic violence, on the one hand the Court left the choice of the concrete measures to secure the rights enshrined in articles 3 and 8 to the states’ margin of appreciation¹⁴⁰. On the other hand, however, the Court made very clear in such judgments that the choices adopted by states in their discretionary power would be scrutinised in order to assess their appropriateness and effectiveness in ensuring respect of the rights established by articles 3 and 8¹⁴¹.

¹³⁴ *Bevacqua v. Bulgaria*, cit., §65.

¹³⁵ *Id.*

¹³⁶ *Opuz v. Turkey*, cit., §159.

¹³⁷ *Id.*

¹³⁸ *A. v. Croatia*, cit., § 60.

¹³⁹ *Id.*

¹⁴⁰ See *Bevacqua v. Bulgaria*, cit., § 82, *Opuz v. Turkey*, cit., §165, *A. v. Croatia*, cit., § 76.

¹⁴¹ See *Bevacqua v. Bulgaria*, cit., § 82 - 83, *Opuz v. Turkey*, cit., §165, *A. v. Croatia*, cit., § 75 -80.

A second important point touched upon by the Strasbourg Court concerns the relevance of domestic violence under the prohibition of discrimination under article 14 of the Convention. This issue was discussed in particular in the cases of *Opuz v. Turkey* and of *A. v. Croatia*. In the *Opuz* case, the Court relied on several sources of international human rights law in order to define domestic violence as a form of discrimination against women. More specifically, in *Opuz* the Court embraced the views expressed by the CEDAW Committee in its General Recommendation no. 19 of 1992¹⁴², which defines all gender-based violence as “a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men”¹⁴³, as well as Resolution 2003/45 of the United Nations Commission on Human Rights¹⁴⁴ and the so-called Belém do Pará Convention on Violence against Women¹⁴⁵. Consequently, the Court determined that “the State’s failure to protect women against domestic violence breaches their right to equal protection of the law”¹⁴⁶. In other words, because domestic violence is *per se* a form of discrimination on the grounds of sex and a breach of women’s right to equality and non-discrimination, states have an obligation under article 14 of the Convention to protect women against such a phenomenon.

It is important to consider that in order to assess whether the respondent states had fulfilled such obligations, in the cases of *Opuz* and *A.* the Court undertook an analysis not only of the domestic legal framework in force, but also of its actual implementation and enforcement. It was precisely such attention that allowed the Court to conclude, in the *Opuz* case, that despite the apparent gender-neutrality of the Turkish laws in force, the general climate of “judicial passivity”¹⁴⁷ in Turkey towards the issue of domestic violence (which disproportionately affected women) constituted *per se* a breach of article 14. The case of *A. v. Croatia*, despite ending with a rejection of the applicant’s claim of violation of article 14, confirmed the possibility to identify a breach of their human right to non-discrimination in the context of domestic violence not only on the basis of the legal framework set up by states but also in relation to the concrete possibilities left to women victims of violence to obtain protection in

¹⁴² Committee on the Elimination of Discrimination Against Women, General Recommendation no. 19 on violence against women, 11th Session, 1992.

¹⁴³ *Ibid.*, par. 1.

¹⁴⁴ United Nations Commission on Human Rights, Resolution 2003/45 on the Elimination of Violence Against Women, 23 April 2003.

¹⁴⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted in Belém do Pará (Brasil) on 9 June 1994. The Strasbourg Court in *Opuz* refers to the Convention as “so far the only regional multilateral human rights treaty to deal solely with violence against women” (see *Opuz v. Turkey*, cit., § 189).

¹⁴⁶ *Opuz v. Turkey*, cit., §191.

¹⁴⁷ *Ibid.*, cit., §198.

such states¹⁴⁸. The attention of the Court towards the actual implementation of national laws on domestic violence in the cases of *Opuz* and *A.* is significant in that it called into question important aspects of “hidden” discrimination such as the disparate impact of inadequate national legal frameworks concerning domestic violence on women specifically, as well as the degree of actual enforcement of these legal provisions and the related attitude of national authorities in this regard.

b. Potential Application of the Strasbourg Court’s Case Law on Domestic Violence to Immigrant Women in the Context of Family Reunification Regimes

In order to understand whether and to what extent the examined principles may be fruitfully applied to immigrant women *vis-à-vis* family reunification regimes negatively affecting their freedom from domestic violence, it is crucial to observe that the case law examined in the previous section focused almost exclusively on enforcement rather than on the gendered shortcomings of discriminatory norms of national law. In other words, in the case law at issue the aim of the Court was mostly to establish whether the national authorities had been sufficiently diligent in assessing the gravity and danger of the applicants’ situations and had taken appropriate measures to prevent further harm.

However, this focus on implementation, and on the effectiveness of the legal protection offered to women against domestic violence, suggests that the Court’s case law may also be effectively applied to immigrant women. It is indeed reasonable to argue that states’ obligations in relation to domestic violence as clarified by the Court do not solely involve the criminal system, but the entire domestic order – including family migration regimes and the general immigration law in force. This observation is supported by the subsequent Strasbourg Court judgment of *Rantsev v. Cyprus and Russia*¹⁴⁹. This case did not concern domestic violence, but a different form of violence against women consisting in trafficking and forced prostitution. The *Rantsev* judgment, in particular, originated from an application by the father of a young Russian woman who had travelled to Cyprus holding a so-called “artiste visa” and a work permit for the purpose of being employed in a cabaret, and who had died under unclear circumstances that suggested that she had been trafficked and sexually exploited. The father of the victim applied before the Court, against both Cyprus and Russia, in order to

¹⁴⁸ *A. v. Croatia*, cit., § 94 – 104.

¹⁴⁹ *Rantsev v. Cyprus and Russia* (First Section), application no. 25965/04, judgment of 7 January 2010.

obtain the recognition of a violation of his daughter's right to life, to be free from torture and inhuman or degrading treatment, to be free from slavery, servitude and forced labour, to liberty and security, and to respect for private and family life, as well as of his own right of access to courts. In relation to the father's claims of violation of his daughter's rights *ex* article 4 of the Convention, the Strasbourg Court established extremely significant principles for our purposes, examining the relevant provisions of Cypriot immigration law, their effects on immigrant women's freedom from exploitation and abuse and, most importantly, the State's responsibility for setting up such a legal system.

The applicant's claims under article 4 of the Convention did not merely relate to the Russian and the Cypriot authorities' "failure to conduct an effective investigation into the circumstances of her arrival in Cyprus and the nature of her employment there"¹⁵⁰ but also tackled their broader "failure to protect his daughter from being trafficked"¹⁵¹. On the grounds of these claims the Court, having established that trafficking falls within the scope of art. 4 of the Convention¹⁵², recalled its previously established general principles on the matter. Thus, the Court highlighted that for the purpose of complying with the prohibitions under art. 4, "the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking"¹⁵³, importantly stressing that "a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking"¹⁵⁴. With specific reference to positive state obligations under article 4, the Court recalled that in addition to "the duty to penalise and prosecute trafficking"¹⁵⁵, member states are also required "in some circumstances (...) to take operational measures to protect victims, or potential victims, of

¹⁵⁰ *Ibid.*, § 253.

¹⁵¹ *Id.*

¹⁵² In this respect, the Court observed that because "trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership" and "treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere" (*Rantsev v. Cyprus and Russia*, cit., § 281), "[there] can be no doubts that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention" (*Ibid.*, § 282). As to article 4, the Court considered that "it is unnecessary to identify whether the treatment about which the applicant complains constitutes 'slavery', 'servitude' or 'forced labour' [because] (...) trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article (a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention" (*Id.*).

¹⁵³ *Rantsev v. Cyprus and Russia*, cit., § 284.

¹⁵⁴ *Id.*

¹⁵⁵ *Ibid.*, § 285.

trafficking”¹⁵⁶ as well as bearing “a procedural obligation to investigate situations of potential trafficking”¹⁵⁷.

In this case, the Court recognised a violation of the victim’s human right to protection from slavery not only on the grounds of the authorities’ failure to effectively investigate a possible case of trafficking, but also on the grounds of the failure of the Cypriot labour migration regime to afford an effective protection against forms of violence against women such as trafficking and forced prostitution. In this respect, the Court found that the excessive control granted to employers over the “artistes” by the Cypriot visa regime suggested that the latter failed to provide a sufficient level of protection against trafficking, breaching art. 4 of the Convention. Thus, the *Rantsev* judgment suggests that national norms of immigration law may be subjected to judicial scrutiny with respect to their effectiveness in preventing cases of violence against women – including domestic violence. In this light, an eventual claim of human rights violations by victims of domestic violence in relation to a national family reunification scheme establishing an unreasonably prolonged dependence between migrant spouses’ residence permits may well be deemed admissible by the Strasbourg Court – especially in light of the discussed observations of the Council of Europe¹⁵⁸.

Furthermore, the Court’s sensitivity in the *Opuz* judgment towards the disparate impact of the national legal regime on women – for the purpose of identifying an indirect discrimination on the grounds of sex in relation to the applicants’ right to life and right to be free from torture and inhuman treatment – appears particularly important for a potential application of the principles established by the Court to immigrant women victims of domestic violence. The Court’s consideration of statistics to determine that the applicants pertained to a group particularly at risk of domestic violence (i.e., women living in a specific region of Turkey) as well as to identify a general context of “discriminatory judicial passivity (...) that was conducive to domestic violence” not only led to the recognition of indirect discrimination, but also suggested that such discrimination relied on multiple grounds – i.e., sex and geographical collocation. Twofold discrimination on the grounds of gender and national or ethnic origin

¹⁵⁶ *Ibid.*, § 286.

¹⁵⁷ *Ibid.*, § 288.

¹⁵⁸ Parliamentary Assembly of the Council of Europe, Committee on Equal Opportunities for Women and Men, Report on *Migrant Women: at Particular Risk from Domestic Violence*, cit.; Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, cit., § 4.1.1.

has been identified by the Council of Europe as one of the main causes for the particular risk of domestic violence to which immigrant women are exposed¹⁵⁹.

Therefore, I believe that a similar argument may also be proposed in support of a recognition of the particular risk of domestic violence to immigrant women on the grounds of sex, nationality, ethnic origin and migrant status. This judicial strategy may unveil the indirectly discriminatory character of legal frameworks of protection established by domestic civil or criminal law which are rendered ineffective by structural limitations, judicial passivity but also, and most importantly for our purposes, by other legal norms undermining immigrant women's access to such legal protections (such as family reunification norms that enforce a high level of dependence of family members on sponsors).

In direct connection with the judicial framing of violence against immigrant women as a source and at the same time as an effect of multiple or intersectional discrimination, an important step forward was marked by the judgment of *B.S. v. Spain*¹⁶⁰ by the Strasbourg Court. The case was initiated by a Nigerian woman working in Spain as a prostitute who has been subjected to physical and verbal abuse by police officers who had stopped and questioned her on multiple occasions. She also submitted that she had been discriminated against not only on the grounds of her skin colour – because other sex workers in the area “with a European phenotype”¹⁶¹ had not been stopped – but also because of her sex. The applicant's case was not simply one of racial profiling by police officers. She had also been insulted with sexist remarks in addition to being beaten by the officers. Furthermore, the applicant's formal complaints before the competent national authorities had remained unaddressed. One specific judge had even observed that the evidence provided “merely [showed] that the applicant repeatedly [failed] to obey police orders given in the course of their duties, designed to prevent the shameful spectacle of prostitution on the public highway”¹⁶².

On these grounds, the Court recognised the existence of a procedural violation of the applicant's right to be free of inhuman and degrading treatment under art. 3 of the Convention, alone and most importantly in conjunction with the right to non-discrimination *ex art. 14*. With respect to the latter finding, the Court observed that the applicant's claim that

¹⁵⁹ Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, cit., § 1.

¹⁶⁰ *B.S. v. Spain* (Third Section), application no. 47159/08, judgment of 24 July 2012.

¹⁶¹ *Ibid.*, § 29.

¹⁶² *Ibid.*, § 14.

she had been subjected to racist and sexist insults had not been examined by the national authorities. As a result, “the decisions made by the domestic courts [failed] to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute”¹⁶³. The configuration of the violence suffered by the applicant as the result of discrimination on the intersecting grounds of sex and race is an extremely important development in the Court’s case law. In the *B.S.* case, the Court not only consolidated the principle whereby judicial passivity on the national authorities’ side may generate state responsibility for the breach of the human rights of victims, but it also recognised for the first time that immigrant women may be disproportionately exposed to violence because they are placed at the intersection of different grounds of discrimination. In fact, the *B.S.* judgment suggests that different grounds of discrimination may combine in ways that make immigrant women’s experiences of violence unique. The applicant’s claim of violation of art.3 in conjunction with art. 14 constitutes a perfect illustration of this point. She indeed held that “her position as a black woman working as a prostitute made her particularly vulnerable to discriminatory attacks and that those factors could not be considered separately but should be taken into account in their entirety, their interaction being essential for an examination of the facts of the case”¹⁶⁴. In this light, it appears clearly that state obligations under the human rights framework provided by the Convention *vis-à-vis* violence against women may be breached whenever national authorities – both legislative and judicial – fail to capture and effectively respond to immigrant women’s specific experiences and difficulties in this matter.

In sum, the Strasbourg Court’s case law on violence against women established important principles in terms of state obligations and due diligence standards in the field of violence against women. The most outstanding result of this jurisprudence was probably the overcoming of the public/private divide in this field, thanks to the Court’s attention to the effective implementation of national legal frameworks in the private sphere of the household. Equally important was the fact that this judicial interpretation also occurred in the context of claims of violations of art. 14 of the Convention, because this angle brought to the fore the disparate impact of norms failing to prevent and punish domestic violence against women specifically. In the *Opuz* judgment¹⁶⁵ in particular, the applicant’s claim of violation of art. 8 in conjunction with art. 14 gave rise to an interpretation of the right to family life as a right to

¹⁶³ *Ibid.*, § 62.

¹⁶⁴ *Ibid.*, § 52.

¹⁶⁵ *Opuz v. Turkey*, cit.

freedom from domestic violence and to sex equality within the family. In this sense, art. 14 was understood by the Court not merely as demanding formal equality but as an anti-subordination clause.

This type of interpretation appears particularly promising beyond the issue of violence against women. In my introduction to this section I observed how the increased risk of domestic violence as a possible perverse effects of family migration norms constitutes an example of the broader problem of the enforced dependence often implied by such norms. While this enforced dependence may fuel domestic violence or hamper immigrant women's possibilities to react to such violence, the most common effect that it may generate is a situation of inequality within the family, and spousal inequality in particular. However, much of the judicial and doctrinal attention in this area has been focussed on domestic violence – the most extreme effect of inequality within the family – while inequality *per se* has been extensively overlooked¹⁶⁶. Thus I believe that the emergence of a right to equality within the family in the *Opuz* case – as the result of a joint interpretation of arts. 8 and 14—should be further developed in order to test its potential with respect to other norms applicable to immigrant women. I would argue that this type of judicial framing could reveal breaches of arts. 8 and 14 by norms that generate the perverse effect of forcing immigrant women into situations of prolonged dependence upon their husbands, highlighting their disparate impact and indirectly discriminatory effects on this group.

The great relevance granted by the Court to the effective implementation of laws of national legal systems and to due diligence standards with respect to the prevention and suppression of violence against women therefore appears promising beyond the realm of domestic criminal law. Admittedly, the majority of the examined judgments concerned citizen women, and therefore the Court has had few occasions to discuss how state responsibility in this area may also arise from biased norms of immigration law. The *Rantsev*¹⁶⁷ and *B.S.*¹⁶⁸ judgments, however, constitute important exceptions –and not only because they concerned non-nationals. The *B.S.* judgment, indeed, performed an interesting recognition of intersectional

¹⁶⁶ In this respect, an isolated voice highlighting the need to broaden the normative and analytical focus from forms of violence against immigrant women to their root cause, i.e., gender inequality, is represented by ASKOLA, H., 'Violence Against Women, Trafficking, and Migration in the European Union', 13 *European Law Journal* (2007) 204.

¹⁶⁷ *Rantsev v. Cyprus and Russia*, cit.

¹⁶⁸ *B.S. v. Spain*, cit.

discrimination¹⁶⁹, as well as of its role in generating violence against women. Arguably, the *B.S.* case constitutes a fitting example of how an intersectional approach is in order to effectively capture phenomena of violence against immigrant women motivated by their being placed at the crossroads of multiple grounds of discrimination.

The *Rantsev* case, on its part, importantly explored the role of a national immigration regime in increasing the risk of violence against immigrant women, recognising state responsibility in this area. The principles established in this case may in my view also be fruitfully applied to other areas of domestic immigration law, including family migration regimes. In particular, the idea whereby state responsibility for human rights violations may arise from domestic norms which have the perverse effect of creating a situation of vulnerability for immigrant women – which emerges from *Rantsev* – enjoys a great value which goes beyond the specific circumstances of the case. This principle is indeed able to shine a light on how certain norms – including family migration rules – may give rise to state responsibility under the European Convention on Human Rights by creating and reinforcing situations of dependence that disproportionately and negatively affect immigrant women's rights in the field of family life.

¹⁶⁹ One of the first legal scholars to introduce the notion of intersectional discrimination was Kimberlé Crenshaw, who criticised “the tendency [of anti-discrimination law] to treat race and gender as mutually exclusive categories of experience and analysis” – CRENSHAW, K., ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, *University of Chicago Legal Forum* (1989) 139; see also CRENSHAW, K., ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’, 43 *Stanford Law Review* (1990-1991) 1241. For the purposes of this chapter, intersectional discrimination should be understood precisely as unlawful differential treatment that occurs on intersecting grounds (e.g. race, sex, migrant status). I am of the view that intersectional discrimination – a concept that was introduced in American scholarship with the main aim of contrasting the single-axis analysis of Black women's experiences of discrimination – is at the present time particularly fitting to describe immigrant women's experiences of discrimination in the European legal space.

In this context, it is also important to stress that multiple and intersectional discrimination are not equivalent concepts. Multiple discrimination merely rests on the sum of two or more grounds. Intersectional discrimination, on the other hand, consists in unlawful differential treatment stemming from an indivisible combination of two or more grounds. In intersectional discrimination, the disadvantage experienced by the targeted category stems from something more than the mere addition of two or more grounds, and cannot effectively be recognised if the synergy of these different grounds is overlooked. For further clarifications on the difference between multiple and intersectional discrimination, see MAKKONEN, T., ‘Multiple, Compound and Intersectional Discrimination’, in Lentin, A., (ed.), *Learning From Violence: the Youth Dimension*, Council of Europe, Strasbourg, 2003.

3. Immigrant Women and Employment: Access to European Human Rights for Immigrant Women Workers

Since its inception, the European Court of Human Rights has evolved from its initial reluctance towards the protection and affirmation of labour rights to a more inclusive attitude towards these rights. At the beginning of its activity, the Court was strongly affected by a legal and historical context characterised by the idea of a complete separation between socioeconomic rights on the one hand and civil and political rights on the other. As a result, until the end of the 1990s the Strasbourg Court consistently rejected claims of violation of workers' rights based on the provisions of the Convention, refusing the idea that the latter also encompassed said rights¹⁷⁰. Since the beginning of the 2000s, however, the Court became increasingly responsive to labour rights claims and started to issue judgments upholding these claims in the two main areas of collective labour rights and access to decent work¹⁷¹.

In this section, I will focus on one specific aspect of the right to employment domain, i.e., the right to protection against labour exploitation. The reason for this focus stems from two main observations. Firstly, despite the significance of collective action for immigrant women's enfranchisement, the utter centrality of this matter for this category is in my view undeniable. Immigrant women disproportionately concentrate in sectors of the labour market characterised by a high risk of exploitation and by very low legal protections. Among them, a particularly problematic sector is constituted by domestic work, where the highly personalised character of employed relationships and especially the isolation entailed by this profession may significantly increase this risk. Secondly, the focus on the right to be free from labour exploitation is demanded by the fact that landmark judgments by the Strasbourg Court on this matter were initiated by applications advanced by immigrant women performing domestic work in private households, in relation to claims of violation of the prohibition of slavery, servitude and forced labour under art. 4 of the Convention. This feature also confirms the particular incidence of labour exploitation issues among immigrant women.

In addition to analysing the Strasbourg Court's case law, this section will also include a critical discussion of the European Committee of Social Rights' activity. While the Strasbourg Court has established key principles in relation to the human right to be free from slavery, forced labour and servitude, to date it has overlooked the specific issue of state

¹⁷⁰ MANTOUVALOU, V., 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', 13(3) *Human Rights Law Review* (2013) 529, p. 531 ff. See also MANTOUVALOU, V., 'Are Labour Rights Human Rights?', cit., p. 157 ff.

¹⁷¹ Mantouvalou, V., 'Labour Rights in the European Convention', cit., p. 536.

responsibility for breaches of this right stemming from national labour migration regimes. The Committee, on the other hand, has thoroughly examined this matter. For this reason, a specific paragraph will be devoted to the main principles established by this body with reference to the possible contribution of national immigration law to immigrant women's vulnerability to labour exploitation.

3.1. Immigrant Women's Freedom from Labour Exploitation in the Light of the Prohibition of Slavery, Servitude and Forced Labour Under Article 4 ECHR

Two main categories of immigrant workers can be identified as particularly at risk of labour exploitation and abuse from employers: immigrant women holding a temporary residence and work permit for the purpose of being employed in the entertainment industry and immigrant women employed as domestic workers. The reasons for this higher risk are strongly connected not only to factual aspects but also to national legal frameworks regulating their labour migration. In this section, I will analyse the specific legal reasons for the vulnerability of these categories of immigrant women workers. At the same time, I will critically assess relevant judgments by the Strasbourg Court on these matters, in an effort to understand whether the human rights enshrined in the Convention supported a stronger consciousness of the perverse effects produced by problematic labour migration schemes and provided possible remedies to their gendered shortcomings.

a. "Artiste" Residence and Work Permits as a Trigger for Exploitation and Trafficking: the Cypriot Case Before the European Court of Human Rights

The perverse effects of temporary work and residence permits in the field of entertainment have been commented on with respect to the high risk of trafficking inherent to such permits¹⁷². During the 1990s, the problematic character of allowing immigrant women to enter the national territory for the specific purpose of working as "artists" on the grounds of a special temporary work permit firstly became clear in the Belgian context, where it emerged that a similar system allowed for the trafficking of foreign women and their channelling into forced prostitution¹⁷³. Interestingly, this issue was resolved by the Belgian authorities – and

¹⁷² LENZERINI, F., 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?', 4 *Intercultural Human Rights Law Review* (2009) 205, p. 233 ff.

¹⁷³ *Id.*

subsequently by the Dutch and Swiss ones – not by completely eliminating the residence and work permit for artists, but rather by allowing immigrant women holding these permits to gain more control over their migration process. For instance, it was established that such permits would be directly released to immigrant women rather than to employers, that permit holders would have the right to decent housing separately from their workplace, to have their employment contracts respected without having to perform additional services, and to have access to information concerning their rights as well as NGOs they could address when in need of help¹⁷⁴.

Arguably, the described measures constituted an effective means of correcting the perverse effects of a national labour migration regime¹⁷⁵. The Belgian case also confirms the powerful role that national immigration law can play in generating and reinforcing immigrant women workers' vulnerability to exploitation and abuse. Thus, a key question remains, concerning what remedies are available against national labour migration regimes overlooking the issue of trafficking and exploitation – and whether European human rights law has so far constituted one of these remedies.

A possible answer to these questions may be provided by the abovementioned *Rantsev* judgment¹⁷⁶. As briefly observed above, the most interesting feature of the *Rantsev* judgment consists in the fact that for the purpose of applying these general principles to the Cypriot context, the Court did not merely analyse the presence of domestic law prohibiting trafficking and sexual exploitation but also looked specifically at the impact of the Cypriot labour migration regime on these phenomena. Arguably, the Cypriot law on “artiste” visas was highly questionable from the point of view of immigrant women's freedom from exploitation, abuse and trafficking. Several of its provisions appeared to reinforce the dependence and isolation that immigrant women workers may already experience when entering a foreign country for the first time. Most of the problematic aspects of the law at issue derived from the high level of control granted to employers over the application procedure and the subsequent stay of artistes in Cyprus. Applications for “artiste” visas as well as residence and work permits had to be filed by prospective employers themselves, who were also requested to deposit a sum of money to cover eventual repatriation expenses. Moreover, artistes were

¹⁷⁴ *Ibid.*, 234.

¹⁷⁵ Lenzerini stresses that “as result of these few simple measures, the request of artiste permits for foreign women virtually ceased”, suggesting that the actual use of these permits for the purpose of bringing prostitutes to Belgium was put to an end (Lenzerini, F., ‘International Legal Instruments’, cit., p. 234).

¹⁷⁶ *Rantsev v. Cyprus and Russia*, cit.

prevented from leaving the premises of the cabarets where they worked from 9 p.m. to 3 a.m., regardless of the duration of their performance. While this measure had apparently been adopted “to prevent artistes from being forced to leave the cabaret with clients”¹⁷⁷, the inevitable consequence of this obligation was a strong limitation of their personal liberty and freedom of movement. Lastly, cabaret managers were under an obligation to alert the authorities if an artiste failed to come into work or if she had breached the terms of her contract. The penalty for the managers’ failure to comply with such obligations, however, also involved the artistes, who would face deportation – paid by their employer.

Interestingly, the problematic aspects of the national immigration law in force were specifically analysed by the Court through the lens of the human right to be free from slavery, servitude and forced labour enshrined in article 4. In particular, the Court took into consideration several reports by NGOs and human rights bodies that pointed out how the “artiste” visa regime envisaged by national immigration law was in fact used to recruit prostitutes who would work in the numerous cabarets and nightclubs in Cyprus¹⁷⁸. In the context of such reports, the Council of Europe Commissioner for Human Rights had highlighted the “risk that the young women who enter Cyprus on artiste visas may be victims of trafficking in human beings or later become victims of abuse or coercion”¹⁷⁹ and observed that “[these] women are officially recruited as cabaret dancers but are nevertheless often expected also to work as prostitutes”¹⁸⁰. As to the specific contribution of national immigration law to this phenomenon, the Commissioner stressed that “[the] system itself, whereby the establishment owner applies for the permits on behalf of the woman, often renders the woman dependent on her employer or agent, and increases the risk of her falling into the hands of trafficking networks”¹⁸¹. This reinforced their vulnerable position with respect to their employers and their consequently disproportionate difficulties in refusing “demands from their employers or clients”¹⁸².

In addition to this, the Court itself significantly observed that “while an obligation on employers to notify the authorities when an artiste leaves her employment is a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations, responsibility for ensuring compliance and for taking steps in cases

¹⁷⁷ *Ibid.*, § 117.

¹⁷⁸ *Ibid.*, § 80 ff.

¹⁷⁹ *Ibid.*, § 100.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

of non-compliance must remain with the authorities themselves”¹⁸³, and it criticised the “measures which encourage cabaret owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes”¹⁸⁴ as “unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus”¹⁸⁵. Similarly, the Court condemned the “practice of requiring cabaret owners and managers to lodge a bank guarantee to cover potential future costs associates with artistes which they have employed” as “particularly troubling”¹⁸⁶.

On these grounds, the Court concluded that “the regime of artiste visas in Cyprus did not afford to [the applicant’s daughter] practical and effective protection against trafficking and exploitation”¹⁸⁷, finding that Cyprus had infringed her right to be free from slavery, servitude and forced labour. The findings of the Court in *Rantsev* suggest that even in the absence of a legislative willingness to reform national immigration law so as to eliminate its negative and unforeseen consequences on immigrant women workers’ freedom from exploitation and abuse, the Court may be ready to intervene. This judgment offers an important example of the capability of the Court to detect and counter such consequences through a human rights lens, as well as to make up for the shortcomings of national immigration law in disproportionately important areas for immigrant women workers, and thus constitutes an extremely important precedent for future cases in this field.

b. Exploitation of Immigrant Women in Domestic Work: Cues for Reflection from the Strasbourg Court’s Case Law

Both European and national labour migration regimes respond to strongly gendered demands for immigrant labour. These demands heavily influence the availability of legal labour migration routes for women. In southern European countries, this situation is epitomised by the high demand for female migrant domestic workers, which is in turn conveyed by the establishment of annual quotas or regularisation schemes specifically for domestic workers by states such as Greece, Italy and Spain¹⁸⁸. The Council of Europe Committee on Migration,

¹⁸³ *Ibid.*, § 292.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Ibid.*, § 293.

¹⁸⁸ LUTZ, H., PALENGA-MÖLLENBECK, E., ‘Care, Gender and Migration: Towards a Theory of Transnational Domestic Work Migration in Europe’, 19(3) *Journal of Contemporary European Studies* (2011) 349, p. 352. See also

Refugees and Population has viewed such schemes as a positive development for acknowledging the high demand for domestic and care workers, for creating access routes from which *de facto* immigrant women might disproportionately benefit and thus at least partially balancing the general difficulty of immigrant women to access legal channels of labour migration¹⁸⁹.

On the other hand, the Committee itself has also emphasised that “domestic workers are among the most exploited and abused workers in the world”¹⁹⁰ and that “predominantly, but not exclusively, women and girls, they often experience working conditions that fall far short of international standards, including low and irregular pay, excessively long working hours, lack of rest periods (...) and exclusion from social protection such as social security and maternity benefits”¹⁹¹. Similarly, ALBIN and MANTOUVALOU have highlighted the “legislative precariousness” of domestic workers in general, discussing “the special vulnerability faced by [this category] because of their exclusion from protective laws or the lower degrees of legal protection they receive in comparison to other workers”¹⁹². While the issue of legislative precariousness certainly affects all domestic workers (both nationals and immigrants), it is undeniable that immigrant domestic workers are disproportionately burdened by this precariousness due to the additional uncertainties deriving from their immigration status. For instance, ANDERSON has revealed through the example of the United Kingdom how domestic workers’ immigration status can grant significant power to employers and thus leave great space for exploitation and abuse¹⁹³.

In view of these problems, several scholars have turned to human rights law as a potentially effective tool of protection for immigrant domestic workers *vis-à-vis* these sources

Moreno-Fontes Chammartin, *Female Migrant Workers’ Situation*, cit., p. 4-5, and Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, cit., § 20. On the gendered implications of quota systems in Southern Europe, see also CALAVITA, K., ‘Gender, Migration, and Law: Crossing Borders and Bridging Disciplines’, 40 (1) *International Migration Review* (2006) 104, p. 119 ff., and PARELLA RUBIO, S., ‘Immigrant Women in Paid Domestic Service. The Case of Spain and Italy’, 9(3) *Transfer: European Review of Labour and Research* (2003) 503.

¹⁸⁹ Parliamentary Assembly of the Council of Europe, *Protecting Migrant Women in the Labour Market*, cit., §18-23 of the Report.

¹⁹⁰ *Ibid.*, § 52

¹⁹¹ *Id.*

¹⁹² ALBIN, E., MANTOUVALOU, V., ‘The ILO Convention on Domestic Workers: From the Shadows to the Light’, 41 (1) *Industrial Law Journal* (2012) 67, p. 69.

¹⁹³ ANDERSON has rightly observed, for instance, that “migrants might be easier to retain if they are bound into formalized arrangements through immigration status”, clarifying that “some immigration statuses give an employer direct control over a workers’ visa renewal (that given to a domestic worker accompanying their employer to the UK, for instance) thereby making them easier to retain” (ANDERSON, B., ‘A Very Private Business: Exploring the Demand for Migrant Domestic Workers’, 14(3) *European Journal of Women’s Studies* (2007) 247, p. 260).

of vulnerability. For instance, ALBIN and MANTOUVALOU have expressed their faith in the potential of the ILO Convention on Domestic Workers to establish a stronger worldwide respect of domestic workers' rights¹⁹⁴. Similarly, SATTERTHWAITE has repeatedly argued in favour of a human-rights based approach to the extension of labour protections with specific reference to immigrant women employed as domestic workers¹⁹⁵.

In the light of these considerations, I will now move on to consider the specific European context, examining whether the Strasbourg Court's case law has offered promising results that may substantiate these author's claims. In particular, I will discuss whether and to what extent the human rights enshrined in the Convention have so far been capable of supporting a stronger protection of immigrant women in the sector of domestic work, especially *vis-à-vis* national legal frameworks which may undermine their freedom from exploitation and abuse. For this purpose, I will discuss a specific matter analysed repeatedly by the Strasbourg Court, i.e., the exploitation and abuse suffered by migrant domestic workers in the light of their human right to be free from slavery, servitude and forced labour under art. 4 of the Convention. After this analysis, I will move on to consider relevant principles established by the European Committee of Social Rights with specific reference to domestic workers, discussing the reasons for its importance for immigrant women employed in the domestic and care sectors.

Starting from the *Siliadin v. France* judgment of 2005¹⁹⁶, the Strasbourg Court has been tackling the phenomenon of exploitation of domestic workers with increasing frequency. In the *Siliadin* judgment, for the first time the Court found a violation of article 4 of the Convention on the grounds of France's failure to comply with its positive obligation to effectively protect the right to be free from servitude and forced labour of a Togolese underage girl who had been forced to perform unpaid domestic work after being trafficked to France. This finding stemmed from the observation of structural limitations of domestic criminal law, which did not envisage criminal offences for breaches of the rights protected by article 4¹⁹⁷.

Following *Siliadin*, third-country national immigrant women started to submit applications before the Court alleging situations of exploitation, abuse and trafficking in relation to

¹⁹⁴ Albin, E., Mantouvalou, V., 'The ILO Convention on Domestic Workers', cit., p. 78.

¹⁹⁵ SATTERTHWAITE, M., 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers', 8 *Yale Human Rights & Development Law Journal* (2005) 1, in particular p. 23 ff.

¹⁹⁶ *Siliadin v. France* (Second Section), application no. 73316/01, judgment of 26 July 2005.

¹⁹⁷ *Ibid.*, § 130 ff.

domestic work. In 2012, two other judgments – *C.N. v. the United Kingdom*¹⁹⁸ and *C.N. et V. c. France*¹⁹⁹ – were pronounced by the Court on the matter, both recognising violations of trafficked workers’ right to be free from servitude and forced labour under article 4 of the Convention on the grounds of the fact that the applicants had been forced to perform unpaid domestic work while held in deplorable living and working conditions. As in *Siliadin*, in these judgments this conclusion stemmed from a recognition of violations of positive state obligations to put in place an effective legal framework to prevent and contrast servitude and forced labour, due to structural limitations of national criminal law frameworks²⁰⁰. Furthermore, two other cases concerning allegations of submission to domestic servitude, i.e., *Kawogo v. the United Kingdom*²⁰¹ and *O.G.O. v. the United Kingdom*²⁰², were initiated before the Court.

The significance of these cases for immigrant women employed as domestic workers in the European legal space is undeniable. Thanks to the similarities in the situation of the applicant women in these cases, the principles established by the Court have also created an important framework for the protection of this category against serious phenomena such as trafficking, exploitation and abuse. All of the applicants in the cases at issue had emigrated from non-European countries and were irregularly residing there at the time of the events examined by the Court. All of them were young women – in the cases of *Siliadin*, *C.N. et V.* and *O.G.O.*, they were underage girls – at the time they had been subjected to domestic servitude. All of them had travelled to Europe with relatives or their previous employers under false pretences – that they would receive an education, or perform paid work – and were subsequently forced into domestic servitude and, due to the irregularity of their stay, were under the constant threat of being reported to the authorities or sent back to their country of origin. Against this background, the Court has established key principles as to positive state obligations to prevent and combat trafficking and labour exploitation.

This development is in itself significant for migrant workers in general, but it also has a special relevance from the point of view of immigrant women workers. In this respect, it can be observed that the discussed case law constitutes a crucial example of the penetration of

¹⁹⁸ *C.N. v. the United Kingdom* (Fourth Section), application no. 4239/08, judgment of 13 November 2012.

¹⁹⁹ *C.N. et V. c. France* (Fifth Section), application no. 67724/09, judgment of 11 October 2012.

²⁰⁰ *C.N. v. the United Kingdom*, cit., § 70 ff., and *C.N. et V. c. France*, cit., § 104 ff.

²⁰¹ *Kawogo v. the United Kingdom* (Fourth Section), application no. 56921/09, decision of 3 September 2013 (struck off the list).

²⁰² *O.G.O. v. the United Kingdom* (Fourth Section), application no. 13950/12 (pending).

human rights law in the private sphere of employment relationships. By envisaging positive state obligations in this field, the Strasbourg Court has included such relationships within the scope of application of the Convention. The break of the public/private divide and the related establishment of positive state obligations in areas characterised by imbalances of power between private parties (also performed in the *Opuz* judgment²⁰³ in relation to the different matter of domestic violence) has been rightly welcomed as a step forward in increasing the applicability of the human rights enshrined in the Convention to the employment realm²⁰⁴. In this light, the principles established by the Strasbourg Court in the field of domestic work have specific importance for immigrant women in this sector. These principles suggest that the human rights established in the Convention can also provide solid ground to effectively contrast the legislative precariousness experienced by immigrant women employed as domestic workers and the resulting vulnerability disproportionately experienced by this category in their employment relationships.

On the other hand, differently than what observed in the *Rantsev* judgment, such principles have so far exclusively concerned the obligation to set up an effective criminal law framework to prevent and punish phenomena of domestic servitude or forced labour. Other areas of law, such as immigration law– including visa and residence permits schemes for domestic workers and their possible contribution to these phenomena – currently remain unexplored²⁰⁵. In this respect, it must be noted that the *Kawogo* case constitutes a missed opportunity for the Court to consider immigration law (and more broadly domestic law provisions applicable to immigrant domestic workers) in the light of states' obligations to protect domestic workers' right to be free from slavery, servitude and forced labour.

The *Kawogo* case originated from the application of a Tanzanian migrant woman, Ms. Kawogo, who had entered the United Kingdom with her employer, a Tanzanian woman, for whom she had performed paid domestic work for the previous three years. Her employer told Ms. Kawogo that she planned to undergo surgery in the United Kingdom, and that Ms.

²⁰³ *Opuz v. Turkey*, cit.

²⁰⁴ Mantouvalou, V., 'Labour Rights in the European Convention on Human Rights', cit., pp. 534-535. See also MANTOUVALOU, V., 'Servitude and Forced Labour in the 21st Century: the Human Rights of Domestic Workers', 35(4) *Industrial Law Journal* (2006) 395, especially p. 400 ff.

²⁰⁵ In *Siliadin*, the focus of the Court entirely concerned the existence of an effective criminal framework for preventing and suppressing trafficking and domestic servitude, and more specifically the fact that French criminal law did not classify slavery and servitude as criminal offences. In the cases of *C.N. v. the United Kingdom* and of *C.N. et V. c. France*, in addition to this point the Court also included in its analysis an assessment of whether the British and French authorities respectively had conducted effective investigations into the applicants' allegations.

Kawogo would be performing paid work for her during their stay and that they would return to Tanzania together after three months. Accordingly, Ms. Kawogo held a domestic work visa valid for three months, whereby any changes – such as a longer stay or a change of employer – had to be expressly authorised by the British authorities. Once they arrived in the UK, however, Ms. Kawogo’s employer confiscated her passport, returned to Tanzania alone after only two weeks (without undergoing any surgery) and left Ms. Kawogo with her own parents (who were residing in the UK), telling her that she would have to work for them in order to repay the cost of her flight. At this point, Ms. Kawogo wanted to return to Tanzania but found herself not knowing the language of the country where she was staying, with no personal contacts except for her “employers”, irregularly working for an employer different than the one specified in her visa and eventually in an irregular residence status due to the expiration of the three months validity of such a visa. With respect to the forced labour suffered by the applicant, the *Kawogo* application highlighted deplorable living and working conditions²⁰⁶ as well as serious limitations of her personal freedom and a lack of pay²⁰⁷. More importantly, among the specific sources of the applicant’s vulnerability, the *Kawogo* application included the fact that she “was not working in accordance with the terms of her visa and was therefore not authorised to work and was liable to be removed from the United Kingdom for breach of her terms of stay”²⁰⁸. Her irregular status, incidentally, was at the heart of her “employers”’ threats against the applicant when she finally reported her situation to the Tanzanian High Commissioner²⁰⁹.

In the light of these facts, the *Kawogo* case does not simply relate to the United Kingdom’s violation of its positive obligation to effectively investigate into the applicant’s allegations as well as enforcement issues²¹⁰. It also suggests that the national visa scheme for domestic workers in itself could be identified as bearing some responsibility for the exploitation endured by the applicant, creating legislative precariousness for immigrant domestic workers

²⁰⁶ More importantly, the applicant stressed that she “was required to carry out domestic work, including cleaning and gardening, (...) as well as personal care (...)”, and that she “worked every day from 7 am until 10:30 pm”, and “[she] was obliged to sleep on a mattress on the kitchen floor [and] (...) [she] was not permitted to use the same eating utensils as [her “employers”]” and that “[her] only personal items were soap, toothpaste and a toothbrush” (*Kawogo v. the United Kingdom* application, §2).

²⁰⁷ The applicant submitted that she “was not permitted to leave the house on her own at all initially, and was later “only allowed to go to church”. She also submitted that “she was never paid any wages” and that “she was sometimes taken to the houses of other relations to work on demand without payment and was required to work even when sick” (*Kawogo v. the United Kingdom* application, § 2).

²⁰⁸ *Id.*

²⁰⁹ *Ibid.*, § 3.

²¹⁰ The applicant submitted that the police authorities failed to conduct an effective investigation and prosecution as to her allegations of forced labour under the criminal law framework (*Kawogo v. the United Kingdom* application, cit., § 4 ff.).

specifically. Domestic work visas such as that granted to the applicant could only be issued to domestic workers who had previously been employed as such for the previous year. More specifically, immigrants seeking such visas had to show that they “[had] been employed as a domestic worker for one year or more immediately prior to the application for entry clearance under the same roof as the employer or in a household that the employer uses for himself on a regular basis”²¹¹, and also had to produce “evidence (...) to demonstrate the connection between employer and employee”²¹². Normally, at the expiration of these visas domestic workers were expected to return to their countries of origin together with their original employer and they would not be entitled to work for other persons beyond their employer’s close family members who were also visiting the U.K.²¹³.

Arguably, similar provisions create a strong link between employers and employees that may significantly and negatively affect domestic workers’ freedom from exploitation and abuse. In particular, I would argue that the legal framework in force at the time of the *Kawogo* application essentially left the regular status of domestic workers’ stays in the hands of their employers. The provisions at issue meant that if the employer left the United Kingdom leaving the domestic worker behind, this would leave the latter with very narrow choices besides working irregularly for a different employer. Indeed, while the possibility to change employer was theoretically envisaged by the legislation in force at the time²¹⁴, it appears very unlikely that an immigrant domestic worker – having resided for a few months in the United Kingdom – would have a sufficient degree of integration to effectively find another employer. The example of Ms. Kawogo is very telling in this respect, because not only was she left behind by her employer in the United Kingdom against her will, but it would also have been *de facto* impossible for her to find a new employer due to her situation of isolation in the host country, her lack of kin network, the very short validity of her visa and her lack of knowledge of any language besides Swahili. Thus, the high likeliness of having to resort to informal

²¹¹ Art. 159A of the Immigration Rules (HC 395 of 1994 as amended by Cm 5597 of 22 August 2002), available at <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/before6april/conditions/> [last consulted on 29 April 2013].

²¹² *Id.* On this matter, see also ANDERSON, B., ‘A Very Private Business’, cit., p. 250.

²¹³ Source: <http://www.ukba.homeoffice.gov.uk/visas-immigration/working/othercategories/domesticworkers/before6april/conditions/> [last consulted on 29 April 2013].

²¹⁴ MULLALLY, S., MURPHY, C., *Migrant Domestic Workers: Exclusions, Exemptions and Rights*, paper presented at the Migration Working Group event on *Migrant Domestic Workers, Care and Relational Rights: Exploring the Limits of Human Rights Norms*, European University Institute, 24 October 2012, p. 5. The authors importantly highlight that the possibility to change employer was also removed by controversial legislative reforms in 2012 (*ibid.*, p. 9).

work as an irregularly staying migrant underlying the legal regime at issue constitutes a critical point, which the Court could examine in the light of article 4 of the Convention as a normative trigger for the labour exploitation of migrant domestic workers. The described difficulties also suggest that domestic workers could be exposed to threats from their employers in relation to being left behind in the host country. Thus, the domestic workers visa regime at issue could contribute to the vulnerability of this category by exposing them to abuse and exploitation not only in case of departure of their employer but also during their working relationship with him or her.

Against this background, I would argue that the *Kawogo* case raised extremely important points as to the relevance of other areas beyond criminal law for the purpose of assessing states' compliance with their obligations under art. 4 of the Convention. Although this aspect was not submitted by the applicant, it appears clearly that her situation of isolation epitomises that of many immigrant domestic workers in Europe. Language barriers, lack of knowledge of the host country's laws, as well as a general physical and social isolation constitute important factors impeding immigrant domestic workers' access to justice. This is in my view constitutes a crucial argumentation in support of the need to consider the domestic legal system applicable to this category as a whole for the purpose of assessing a state's compliance of its art. 4 obligations. Indeed, a comprehensive set of criminal provisions concerning slavery, servitude and forced labour and an efficient enforcement system may not be sufficient when other legislation aggravates such specific difficulties and produces the perverse effect of triggering labour exploitation. In this respect, the brief filed by INTERIGHTS as a third party intervener²¹⁵ in the *Kawogo* case is illuminating. The brief highlighted that "migrant domestic workers are even more vulnerable to abuse for a number of additional reasons associated with their non-national status"²¹⁶, referring in particular to the high degree of dependence from employers which can be imposed to immigrant domestic workers by visa schemes²¹⁷. In particular, INTERIGHTS pointed to the two-fold negative

²¹⁵ INTERIGHTS, i.e. the International Centre for the Legal Protection of Human Rights, is an international human rights law organisation which, in accordance with rule 44 of the Rules of the European Court of Human Rights, has submitted written comments in several cases involving immigrant women and/or gendered issues, such as *Opuz v. Turkey*, cit., and *Rantsev v. Cyprus and Russia* (application no. 25965/04, judgment of 7 January 2010). The brief submitted with reference to the *Kawogo* case is available at <http://www.interights.org/search-results-summary/index.html?term=kawogo&area=all> [last accessed on 29 April 2013].

²¹⁶ *Ibid.*, § 8.

²¹⁷ In particular, the brief recalled that "migrant domestic workers can be highly dependent on their employer in respect of arranging or renewing their visa" and that "they may also face the risk of having their visa withdrawn if their employment relationship with a particular employer is terminated" (*ibid.*, § 8).

effects of this factor, among others, on migrant domestic workers' rights, consisting in the heightened risk of abuse and exploitation on the one hand and on the undermining of their ability to seek and obtain legal redress on the other²¹⁸. Therefore, the brief concluded that the mere availability of criminal legal frameworks might be utterly insufficient to ensure an effective protection of migrant domestic workers' rights under article 4 of the Convention²¹⁹.

In this light, it is disappointing that the Strasbourg Court decided to strike the *Kawogo* application off its list of cases simply because the United Kingdom submitted that in the meantime criminal law reforms had made this field more comprehensive, by including slavery and servitude among criminal offences. In my view, the applicant had rightly responded to this statement by recalling that other legal issues required consideration. In the applicant's view, these issues included "the steps that the respondent State could have taken to prevent her from being subjected to forced labour and servitude"²²⁰ in the first place – which could have well involved the domestic workers visa scheme – and "the extent of the obligation to provide *in situ* support"²²¹. I would argue that a more in-depth analysis of the Court on the merits of the case may have offered important clarifications as to states' obligations in relation to immigrant domestic workers beyond the realm of criminal law. Despite the fact that the applicant's claims remained unanswered for this part, the INTERIGHTS report still suggests the great relevance of this matter in a human rights context. In this sense the Court's narrow focus on criminal law in this case is disappointing, because clearly prevention measures should also have been incorporated in the British visa regime for domestic workers.

These observations should not however prompt the conclusion that the judicial application art. 4 of the Convention exclusively involved criminal law. As the *Rantsev* case has shown, the right to be free from slavery, servitude and forced labour may also be successfully applied to other areas of law, including immigration law. In fact, in this case the Cypriot government was found in breach of art. 4 due to the insufficient protection against trafficking afforded by its system as a whole. The *Rantsev* judgment involved an in-depth scrutiny of the "general legal and administrative framework"²²², and of the way in which such a framework rendered the protections afforded by the national anti-trafficking legislation moot for artistes in particular. In this respect, I would also argue that recalling the principle of non-discrimination

²¹⁸ *Ibid.*, § 10.

²¹⁹ *Id.*

²²⁰ *Kawogo v. the United Kingdom*, cit.

²²¹ *Id.*

²²² *Rantsev v. Cyprus and Russia*, cit., § 291.

in conjunction with art. 4 may help to further dismantle abstract divisions between different areas of law that may prevent the Court's full awareness of the perverse effects of labour migration regimes in areas where immigrant women prevail, such as domestic work for instance. In *Kawogo*, claiming a violation of art. 14 in conjunction with art. 4 could have constituted an effective judicial strategy to emphasise the disparate impact of the British visa regime on the applicant – an immigrant woman with no connections in the host country, no financial resources, no knowledge of the British language or of its legal system, and employed as a domestic servant in a private household. By doing so, it would have emerged more clearly that the United Kingdom had breached the applicant's right to live free of labour exploitation notwithstanding the criminal law reforms, because the domestic legal system as a whole prevented her to access justice and obtain redress.

3.2. Immigrant Women Workers' Possibilities to Change Employers or Employment in the Light of Article 18 of the European Social Charter

The examined cases before the European Court of Human Rights suggest the presence of a common thread running through the problematic norms of national immigration law brought to the Court's attention, consisting in the great amount of power indirectly granted by such regimes to employers. In *Rantsev*, the strong control granted by the "artiste" visa regime to employers – both in relation to the application process and to their employees' regular permanence in the host country – was acknowledged by the Court as a specific source of vulnerability of women holding such permits to trafficking, abuse and exploitation. In *Kawogo*, a similar assessment is suggested by the framing of the domestic workers' visa regime merely as a tool for employers to bring along previously employed persons in order to be assisted during short visits in the United Kingdom, with *de facto* few possibilities for domestic workers to emancipate themselves from abusive employers.

In this light, it appears that a crucial aspect for immigrant women workers' freedom from exploitation and abuse concerns their full access to the possibility to change employer in the host country. The risk of exploitation inherent in narrowing workers' possibility to change employers has been highlighted with reference to migrant workers in general²²³. Nevertheless, the discussed judicial examples suggest that this restriction can further aggravate the high risk of exploitation characterising sectors where immigrant women concentrate, such as those of

²²³ RYAN, B., *Labour Migration and Employment Rights*, Institute of Employment Rights, 2005, p. 40. See also ANDERSON, B., 'Migrants and Work-Related Rights', 22 (2) *Ethics & International Affairs* (2008) 199, p. 201.

entertainment and domestic work. As I have shown, the Strasbourg Court has yet to analyse this issue. The European Committee of Social Rights, on the other hand, has established extremely interesting principles on the matter, which bear the potential of a fruitful application to immigrant women workers. The most relevant observations by the Committee in this area are to be found in conclusions adopted in the framework of the reporting procedure regulated by arts. 19 –21 of the Committee Rules²²⁴. Unfortunately, a similar diffusion is not observable in the decisions adopted by the Committee under the collective complaints procedure pursuant arts. 23 ff. of the Rules²²⁵. This is regrettable because while in the vast majority of cases States Parties do comply with the Committee's conclusions, the latter do not rely on strong implementation mechanisms. In case of non-compliance with conclusions, the Committee of Ministers will merely issue a recommendation – which, as a political act, enjoys little binding force. The Committee's decisions on collective complaints, on the other hand, may be properly qualified as case law because they are increasingly acquiring a binding and more judicial character, with a growing attention to the legal situation of the involved countries as well as to the necessary normative steps to take in order to remedy the identified violations²²⁶.

²²⁴ Rules of the European Committee of Social Rights, adopted on 29 March 2004, available at http://www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/ESCRRules_en.asp [last accessed on 8 July 2014].

²²⁵ A possible exception may be seen in the currently pending case concerning a collective complaint made by the Federation of Catholic Family Associations in Europe in relation to alleged deficiencies of the Irish authorities in identifying child victims of trafficking and the low number of prosecutions and convictions of perpetrators. While the case of the *Federation of Catholic Family Associations in Europe (FAFCE) v. Ireland* (complaint no. 89/2013, decision on admissibility of 2 July 2013) relates to the general problem of child trafficking for various purposes, the Committee may establish interesting principles concerning the right of minor children to obtain protection against trafficking for the purpose of labour exploitation under art. 17 of the Charter. In this case, it will be interesting to compare the resulting decision of the Committee with the principles established by the Strasbourg Court in its case law on art. 4 of the Convention – especially with reference to those judgments that concern minors submitted to domestic servitude and forced labour (*Siliadin v. France*, *C.N. and V. v. the United Kingdom*, and *O.G.O. v. the United Kingdom*).

On a broader level, the Committee has rarely discussed issues experienced by immigrants in general in its decisions, since few collective complaints have concerned this group. Among the few decisions on the matter, it is possible to cite the case of *International Federation of Human Rights Leagues (FIDH) v. France* (complaint no. 14/2003, decision of 3 November 2004), where the Committee found that the exclusion from medical assistance of the children of irregularly staying foreigners (beyond assistance that was necessary in case of immediate threats to life) was in breach of the right to receive social, legal and economic protection under art. 17 of the European Social Charter. Always in relation to children of irregularly staying migrants, the Committee subsequently recognised a violation of art. 17 as well as of the right to housing established by art.31(2) of the Charter in the case of *Defence for Children International (DCI) v. the Netherlands* (complaint no. 47/2008, decision of 20 October 2009). Similarly, another case currently pending before the Committee – *Conference of European Churches (CEC) v. the Netherlands* (complaint no. 90/2013, decision on immediate measures of 25 October 2013) – also concerns irregular migrants, and in particular their right to housing and shelters.

²²⁶ BRILLAT, R., 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact', in De Búrca, G., de Witte, B., (eds.), *Social Rights in Europe*, Oxford University Press, Oxford, 2005, p. 32 ff.

Ever since its earlier activity, the Committee has interpreted the right to work established by article 18 of the European Social Charter as prohibiting excessively strict ties of migrant workers to a specific employment or employers. Before moving on to discussing the Committee's position on the matter, it is important to stress that in this context the exclusive application of the Charter to migrant workers who are nationals of other State Parties does not undermine the relevance of such a case law for the purpose of this section's analysis. Indeed, while it is certainly true that only a part of third-country national workers are theoretically affected by the Committee's reasoning, the practical outcomes of the Committee's conclusions are extremely likely to positively affect all third-country national workers residing in States Parties to the Charter. Indeed, in this context the Committee simply established general principles and obligations for the States Parties to follow when regulating the entry and stay of migrant workers regardless of their citizenship. While Union citizen migrants usually enjoy a more favourable legal treatment in EU Member States, it is much less common to observe a separate immigration regime for migrant citizens of States Parties of the Council of Europe. Generally, all non-EU immigrants are covered by the scope of one legal regime, unless their state of origin has concluded special agreements with the host country. Therefore, as far as third-country national workers from other States Parties are concerned, it would be logical to expect that States Parties would comply with the Committee's conclusions by modifying their national immigration regimes, with positive effects not only for nationals of States Parties but for all third-country national immigrants covered by such regimes.

Moving on to the Committee's stance on the links between validity of the residence permits and specific employers or employment, its main normative basis is constituted by article 18 of the Charter, establishing the right to engage in a gainful occupation in the territory of any other Party. Article 18 obliges States Parties to "apply existing regulations in a spirit of liberality" (§1), "to simplify existing formalities and to reduce or abolish (...) charges payable by foreign workers or their employers" (§2), "to liberalise (...) regulations governing the employment of foreign workers" (§3) and to recognise "the right of their national to leave the country to engage in a gainful occupation in the territories of the other Parties" (§4).

Already in 1971²²⁷, the Committee had interpreted the reference to the “spirit of liberality” in article 18(1) as specifically requiring a progressive but steady realisation of foreign workers’ right to access professions different than those for which they had been initially authorised to work. More specifically, the Committee noted that “[any] regulation which de jure or de facto restricts an authorisation to engage in a gainful occupation to a specific post for a specific employer cannot be regarded as satisfactory”²²⁸. Even more importantly for our purposes, the Committee further established that “[to] tie an employed person to an enterprise by the threat of being obliged to leave the host country if he loses that job, in fact constitutes an infringement of the freedom of the individual such that cannot be regarded as evidence of a ‘spirit of liberality’ or of liberal regulations”²²⁹. Finally, while admitting that tying foreign workers to a specific type of job “in certain occupational and geographical sectors”²³⁰ might be justified for economic or social reasons, the Committee explicitly condemned “the obligation to remain in the employment of a specific enterprise”²³¹. Therefore, the Committee has consolidated the principle whereby national regimes tying foreign workers to specific employers for the purpose of the legitimacy of their residence and under the threat of expulsion breaches article 18(1) of the Charter. On the other hand, a similar condemnation was not expressed towards national regimes confining immigrant workers to specific types of jobs, which were considered by the Committee as compatible with the “spirit of liberality” *ex* art. 18(1) of the Charter.

Subsequently, the Committee reiterated its criticism of national legal regimes linking the validity of residence permits on the one hand and employment for a specific employer on the other. In particular, several Conclusions by the Committee specifically analysed national immigration law regimes establishing severe limitations against the possibility for immigrant workers to change employers for considerable periods of their stay. One of the most relevant cases in this area concerned the German legal regime on foreign workers²³². That regime established that once foreign workers were authorised by the federal employment agency to perform a specific job for a specific employer, they could not change either employment or employer for their first four years of residence and three years of compulsory social insurance. In this respect, the Committee emphasised that “making employees dependent on one

²²⁷ European Committee of Social Rights, Conclusions II, Statement of Interpretation, article 18, 31 July 1971.

²²⁸ *Ibid.*, § 3.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² European Committee of Social Rights, Conclusions XIX-1 (Germany), article 18, 18(3), 24 October 2008.

employer, with the threat if they lose their jobs of being obliged to leave the host country cannot be considered to reflect a spirit of liberality or flexible regulations”²³³ and that “regulations such as these that limit the right to enter gainful employment to a specified job and a specified employer cannot be deemed to be in conformity with Article 18 of the Charter”²³⁴. A similar condemnation of national immigration law regimes granting work permits exclusively linked to a specific employer was expressed by the Committee in relation to Turkey²³⁵, Slovenia²³⁶ and Sweden. As far as Sweden in particular is concerned, on multiple occasions²³⁷ the Committee examined the rule established by Swedish immigration law whereby temporary permits are exclusively granted for a specific job with a specific employer, and repeatedly pressured Sweden to legislative reform on the grounds of the incompatibility of such a legal regime with article 18(3) of the Charter. In its last Conclusions on Sweden, in particular, the Committee reinstated the importance of this aspect by once again finding Sweden in violation of article 18(3), notwithstanding the State’s efforts at reforming national immigration law, precisely because “the draft bill makes no change to the rule that temporary work permits may be issued only for a specific job, with a specific employer, in cases of shortages in the workforce”²³⁸.

In the context of its analysis of violations of article 18 of the Charter, and of article 18(3) in particular, the Committee also established a broader principle that might serve as a useful basis to alleviate the unbalanced power relationships disproportionately experienced by immigrant women in the context of their work. Indeed, beyond the specific issue of linking the validity of residence permits with the maintenance of a specific employer, the Committee also repeatedly criticised national legal regimes establishing an automatic expiration of residence permits in case of job loss. In particular, the Committee stated on several occasions that “in the event of loss of employment Article 18 of the Charter requires extension of the validity of the residence permit to provide sufficient time for a job to be found”²³⁹. Thus, in the Committee’s view, national immigration law regimes establishing a strict link between the

²³³ *Id.*

²³⁴ *Id.*

²³⁵ European Committee of Social Rights, Conclusions XIX-1 (Turkey), article 18, 18(3), 24 October 2008.

²³⁶ European Committee of Social Rights, Conclusions 2005, Vol. 2 (Slovenia), article 18, 18(3), 9 March 2005 and Conclusions 2008, vol. 2 (Slovenia), article 18 and 18(3), 24 October 2008.

²³⁷ European Committee of Social Rights, Conclusions 2003, Vol. 2 (Sweden), article 18, 18(3), 30 June 2003. See also Conclusions 2005, Vol. 2 (Sweden), article 18, 18(3), 3 September 2005 and Conclusions 2008, Vol. 2 (Sweden), article 18, 18(3), 24 October 2008.

²³⁸ European Committee of Social Rights, Conclusions 2008, vol. 2 (Sweden), *cit.*

²³⁹ European Committee of Social Rights, Conclusions XVII-2, Vol. 1.(Finland), article 18, 18(3), 30 June 2005. See also 2005 Conclusions, Vol. 2 (Sweden), *cit.*, and Conclusions XIX-1 (Germany), *cit.*

validity of residence permits and the constant employment of the holders are contrary to article 18 of the Charter. Accordingly, in the case of Sweden and Germany, the affirmation of this principle led the Committee to find a violation of article 18(3) precisely on the basis of their immigration regimes. In particular, the Committee chastised the Swedish system for not allowing immigrant workers who had lost their jobs to extend their residence permits in order to find new employment²⁴⁰, while the German regime was deemed by the Committee as in breach of article 18(3) of the Charter because it provided for the possibility that the validity of residence permits could be retroactively reduced in case of job loss²⁴¹.

It appears quite clearly in my view that a positive effect of the principle at issue is to support immigrant workers' access to employment in their host states, but also to ensure the protection of their freedom from labour exploitation and abuse by de-linking dismissal and unemployment on the one hand and immediate loss of residence rights on the other. Such an interpretation is also suggested by the fact that on at least two occasions, in the context of analyses concerning the extension of residence permits for the purpose of finding a new job, the Committee specifically enquired into whether extensions of residence permits were also possible "pending a court ruling on an appeal made by a foreign worker against his/her dismissal"²⁴².

The discussed conclusions of the Committee never specifically mentioned immigrant women workers, nor did they explicitly consider the gendered implications of national immigration law regimes imposing immigrants to work for a specific employer, or exposing them to the threat of expulsion in case of job loss. However, the Committee's condemnation of legal regimes imposing a dependence of immigrant workers on one specific employer, or establishing an automatic loss of residence permits in case of redundancy, appears to be particularly important for this category. It provides a human rights basis to remedy employment relationships excessively unbalanced in favour of the employer and the consequent higher risk of labour exploitation that may derive from it. Because these issues primarily and disproportionately affect immigrant women, the very focus of the Committee on these problems is a specifically important development for this group. The insistence of the Committee on these issues and its efforts to push States Parties to modify their immigration law regimes in conformity with article 18 of the Charter appear even more

²⁴⁰ 2005 Conclusions, Vol. 2 (Sweden), cit.

²⁴¹ Conclusions XIX-1 (Germany), cit.

²⁴² European Committee on Social Rights, Conclusions XVII-2, Vol. 1.(Finland), cit., and Conclusions XVII-2, Vol. 1 (Iceland), article 18, 18(3), 30 June 2005.

important if one considers the absence of similar principles in the European Court of Human Rights' case law.

4. Concluding Remarks

The analysed case law of the European Court of Human Rights as well as of the European Committee of Social Rights prompts interesting observations, both with respect to the most common gendered shortcomings observable in national immigration law, and to the effects of European human rights law on such a bias. The gendered shortcomings of domestic rules on immigration on which I have focused in this chapter are essentially ascribable to two features: the overlooking of specific difficulties experienced by immigrant women and the adoption of inadequate abstract models of the members of this group.

Regarding the first problem, I investigated the role eventually played by the Court in unveiling and correcting the disparate impact on immigrant women generated by norms affected by a lack of awareness of this group's specific issues, in respect to domestic violence and labour exploitation. My analysis of these contexts revealed that the Court's case law so far has mainly focused on domestic criminal law, thus preventing a general assessment of the impact of European human rights law on this matter. However, I also noted how a significant and positive example of judicial influence of the human right to be free from slavery, servitude and forced labour on the disparate impact generated by a national labour migration regime was offered by the *Rantsev* judgment – and that the *Kawogo* case constituted a missed opportunity for further development in this regard. In relation to this, I also observed how the European Committee of Social Rights consistently established key principles with respect to states' obligations to ensure that their immigration regimes do not negatively influence immigrant workers' right to be free from labour exploitation.

Secondly, in relation to the indirectly discriminatory effects of national rules on immigration embracing an abstract and essentialising model of "immigrant woman", I observed how the human rights lens did not prevent the Court's embracing of these gendered narratives and their reproduction and enforcement at the supranational level. This precluded the recognition of the disparate impact of national immigration rules, *per se* or as enforced by the national authorities, on the involved immigrant women. An illustration of this phenomenon was provided by the *Haydarie* judgment and by the numerous decisions concerning transnational mothers. As a consequence, the human rights framework of the Convention could not expose the shortcomings of the relevant Dutch immigration law

provisions, but rather perpetuated their indirectly discriminatory effects. Interestingly, the only exception to this phenomenon was provided by the case of *Abdulaziz, Cabales and Balkandali*, where the Court was able to detect that the British family reunification regime constituted a form of discrimination against immigrant women because it was based on gendered and inexact assumptions as to the distribution of productive and reproductive work within immigrant families. In relation to this, I observed that the prohibition of direct and indirect discrimination enshrined in article 14 of the Convention, in combination with the right to family life *ex* article 8, constituted a decisive reference in *Abdulaziz*, and that its potential to turn the Court's attention to the disparate impact of legally-enforced gendered models should be further pursued through legal claims in this sense.

In sum, it appears clearly that European human rights law has not so far been consistently capable of exposing and correcting the gendered shortcomings of specific national immigration law provisions, or of their implementation and interpretation by the national authorities. On the one hand, successful cases have been identified in this chapter, both in the field of family life and in that of employment. On the other hand, the Court has also made some mistakes, the most visible of which concerns the consistent reproduction of deeply gendered and stereotypical normative views based on an essentialised notion of immigrant women.

In conclusion, I would argue that the analysis conducted in this chapter ultimately suggests that the European system of human rights can constitute a powerful tool for immigrant women aiming to expose the perverse effects of national rules applicable to them, but that a gender-sensitive interpretation of this system itself is essential to fully realise this potential. Not only is the emergence of consolidated principles in this field naturally exposed to the possibility of continued setbacks, but the Strasbourg Court itself may also internalise gendered notions concerning immigrant women's role, aspirations and needs. After all, it would be naive and far-fetched to identify supranational courts as infallible champions of sex equality, as opposed to national legislators and judges unaware of the specificities and extreme diversity of immigrant women in the European legal space. In fact, precisely because the normative embracing of gendered notions is often an unconscious occurrence, and the disproportionate and negative effects of certain norms on immigrant women often constitute unpredicted, perverse effects, it appears even more likely that human rights courts too may incur in the same mistakes.

CHAPTER TWO

European Fundamental Rights: A Remedy to the Gender Bias of EU Immigration Law?

Introduction

In the previous chapter, I examined the capability of European human rights law to unveil and correct the gender bias – or gender biased interpretations – of national rules of migration law. It must be noted, however, that national immigration law is not the only problematic legal source for immigrant women. European Union law may indeed equally present gendered shortcomings in the fields of family life and employment. This is a problem of considerable importance, because since the Maastricht Treaty of 1992 the European Union has significantly expanded its competences in the field of immigration. The power to control the entry and stay of foreigners on the national territory is one of the most important components of state sovereignty. The fact that Member States are increasingly bound to respect a common European framework of rules and policies on the matter is therefore extremely significant, although the resistance of Member States to cede sovereignty in this area is still very strong²⁴³.

In 1992, the Maastricht Treaty²⁴⁴ introduced the matters of asylum and immigration within the competences of the Union under Title VI, dedicated to *Provisions on Cooperation in the Field of Justice and Home Affairs*. However, its article K.1 merely established an obligation for Member States to regard these areas “as a matter of common interest”²⁴⁵. It did not grant the

²⁴³ WIESBROCK, A., *Legal Migration to the European Union*, Martinus Nijhoff Publishers, Leiden, the Netherlands, 2010, p. 161.

²⁴⁴ Treaty on European Union, O. J. C 191 of 29 July 1992.

²⁴⁵ More specifically, article K.1. stated that “For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:

1. asylum policy
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries:
 - a) conditions of entry and movement by nationals of third countries on the territory of Member States;
 - b) conditions of residence by nationals of third countries on the territory of member States, including family reunion and access to employment;

Union with the power to establish binding common rules in the area of immigration and asylum, but merely allowed the adoption of non-binding intergovernmental measures²⁴⁶.

In 1997, the Treaty of Amsterdam²⁴⁷ introduced for the first time a Union competence to adopt binding rules on migration matters in its Title IV, entitled *Visa Asylum Immigration and Other Policies Related to Free Movement of Persons*. Article 61 established the competence of the Union to adopt measures in the matters of external border controls, asylum and immigration as well as measures “safeguarding the rights of nationals of third countries”²⁴⁸. More specific provisions were provided by article 62, which granted the European Council the power to adopt measures concerning “the crossing of the external borders of the Member States”²⁴⁹, which included standards on the checks carried out by Member States on persons at external borders and rules on short stay visas (no more than three months), as well as measures establishing the conditions under which third-country nationals could travel within the territory of the Union. Moreover, art. 63 of the Treaty established the power of the European Council to adopt measures on asylum, refugee protection, the rights and conditions of residence in other Member States for legally resident third-country nationals and measures on immigration policy within the areas of illegal migration and of “conditions of entry and residence” of third-country nationals, as well as on “standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion”²⁵⁰. This bundle of provisions established the first competence of the European Union to adopt binding rules in the field of immigration, and most importantly in the field of immigrants’ fundamental rights.

While the Treaty of Nice of 2001²⁵¹ did not modify the competence of the Union in the field of immigration, the Treaty of Lisbon in 2007 has brought important changes, starting from the inclusion of immigration in Title V, devoted to the Area of Freedom, Security and Justice. Moreover, while article 61 of the Amsterdam Treaty simply referred to a competence of the Union to adopt measures in the field of migration, the Lisbon Treaty has introduced a new objective for the Union, i.e., “framing a common policy on asylum, immigration and

c) combating unauthorised immigration, residence and work by nationals of third countries on the territory of Member States;

(...)”.

²⁴⁶ Wiesbrock, A., *Legal Migration*, cit., p. 134.

²⁴⁷ Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Related Acts, O. J. C 340, 10 November 1997.

²⁴⁸ Article 61, letter b) of the Treaty

²⁴⁹ Article 62, paragraph 2, of the Treaty.

²⁵⁰ Article 63, paragraph 3, letters a) and b), of the Treaty.

²⁵¹ Treaty of Nice Amending the Treaty on the European Union, The Treaties Establishing The European Communities And Certain Related Acts, O. J. C 80, 10 March 2001.

external border control (...) which is fair towards third country nationals”²⁵². Consequently, the Lisbon Treaty has also modified articles 62 and 63 of the Amsterdam Treaty by clarifying specific aspects of this more comprehensive competence of the Union. While article 77 has substituted article 62 in establishing the competence of the Union to adopt a common visa policy and other measures mostly concerning external borders management, article 79 focuses almost exclusively on legal migration and on common standards in the treatment of immigrants from outside the EU. More specifically, article 79 established the competence of the Union to develop a common immigration policy aimed at ensuring not only an efficient management of migration flows but also the “fair treatment of third-country nationals residing legally in Member States”²⁵³. Furthermore, paragraph 2 of article 79 has not only confirmed the power of the Union to adopt measures concerning conditions of entry and residence as well as standards on the procedures applied by Member States to grant long-term visas and residence permits – as already established by article 63, paragraphs 2 and 3 of the Amsterdam Treaty – but it has also introduced a new area of competence, i.e., “the definition of the rights of third-country nationals residing legally in a Member State”²⁵⁴. The new emphasis on the need to develop common standards in the definition of the rights of immigrants in the EU is complemented by paragraph 4 of article 79, which also allows the European Parliament and the Council to adopt measures with the view of promoting the integration of legally resident immigrants.

Concurrently with the evolution of the Union’s competences in the field of migration, soft-law sources started to develop. For our purposes, it is interesting to observe that European immigration policy documents have steadily transitioned from a phase of utter gender-insensitivity to one of awareness of the need to effectively tackle immigrant women’s integration. Initially, important policy documents such as the Tampere Conclusions of 1999²⁵⁵, the Common Basic Principles for Immigrant Integration of 2004²⁵⁶ and The Hague

²⁵² Article 67, paragraph 2, TFEU.

²⁵³ Article 79, paragraph 1, TFEU.

²⁵⁴ Article 79, paragraph 2, letter b), TFEU.

²⁵⁵ Tampere European Council, Presidency Conclusions 15 and 16 October 1999. Interestingly, the only point of the Conclusions where foreign women were explicitly mentioned concerned the different objective of developing a common response against human trafficking (*ibid.*, § 48), while being completely overlooked with respect to the objective of pursuing “a more vigorous integration policy” (*ibid.*, § 18).

²⁵⁶ Council of the European Union, 2618th Justice and Home Affairs Council Meeting, *Common Basic Principles for Immigrant Integration Policy in the European Union*, 19 November 2004.

Programme of 2005²⁵⁷ consistently failed to consider gender-specific issues in the field of migration²⁵⁸. Around 2005, on the other hand, soft-law sources started mentioning the need to adopt a gender perspective in immigration policies, mostly with the view of promoting the integration of immigrant women in their host society through their stronger inclusion in the labour market²⁵⁹.

However, such an evolution was mostly characterised by the introduction of exhortative statements towards Member States or EU institutions concerning the importance of adopting gender sensitive policies and legislation, rather than by an actual adoption of said policies or legislation for immigrant women. This further development, arguably much needed for effectively pursuing immigrant women's integration, has yet to arrive. From this point of view, it appears quite significant that the first acknowledgments of the need for a stronger gender-sensitivity in EU immigration policy date back to 2005 and yet no document has actually adopted a gender-sensitive policy in the field of immigrants' integration. Even more importantly, the rhetorical choice of calling for a stronger gender sensitivity of European legal sources in the field of migration has not been accompanied by an in-depth assessment of what changes in policy and legislation are actually needed to reach this goal.

Beyond soft-law sources, the emergence and expansion of the competence of the Union on migration matters prompted the progressive creation of a corpus of hard-law sources at EU

²⁵⁷ The Hague Programme Strengthening Freedom, Security and Justice in the European Union(2005/C 53/01), O. J. C53 of 3 March 2005.

²⁵⁸ Although the lack of mentions of gender-sensitivity in general documents of immigration policy such as the Tampere Conclusions or The Hague Programme is somewhat understandable considering that the aim of such documents was to establish general and comprehensive guidelines in order to develop an area of freedom, security and justice, the same cannot be said for a specific policy document on integration such as the Common Basic Principles of 2004 – which was specifically aimed at establishing common guidelines that all Member States could follow while developing and implementing integration policies

²⁵⁹ See for instance the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A Common Agenda For Integration: Framework for the Integration of Third-Country Nationals in the European Union*, COM(2005) 389, 1 September 2005, especially pp. 3 and 6, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Common Immigration Policy for Europe: Principles, Actions and Tools*, COM(2008) 359, 17 June 2008, especially pp. 6 and 7, and Council of the European Union, Declaration of the Presidency, *European Ministerial Conference on Integration* (Vichy 3-4 November 2008), 29 October 2008, especially p. 6. See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strategy for Equality Between Women and Men 2010 – 2015*, COM (2010) 491, 21 September 2010, § 1, and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda for the Integration of Third-Country Nationals*, COM(2011) 455, 20 July 2011.

level, and thus of a binding European immigration regime²⁶⁰. A first group of legal sources was adopted with respect to the fields of family migration and long-term residence. Thus, in 2003, Directive 2003/86/EC²⁶¹, regulating the exercise of the right to family reunification of third-country nationals and Directive 2003/109/EC²⁶² on long-term residency status were adopted. The following year, Directive 2004/38/EC²⁶³, established relevant rules for third-country national family members of Union citizens by including them in the enjoyment of freedom of movement and residence within the territory of the Union.

A more recent group of sources, on the other hand, concerned labour migration. Until 2011, this system clearly reflected a clear intention to attract “desirable” categories of immigrant workers, identifiable in two main categories: highly-skilled workers and temporary or circular workers. While the first category is regulated by Directive 2009/50/EC – the so-called Blue Card Directive²⁶⁴, a legal framework on the second category is currently under construction. In addition to the already in force Directive 2005/71/EC on third-country national researchers²⁶⁵, two directive proposals on seasonal workers²⁶⁶ and intra-corporate transferees²⁶⁷ are currently under discussion. After 2011, however, this normative landscape changed thanks to the adoption of Directive 2011/98/EU, i.e., the Single Permit Directive²⁶⁸. This Directive is the first source in the field of labour migration to have a general character and not to focus on a specific profession, rather it establishes a common procedure for the entry and stay of all third-country national workers.

²⁶⁰ Among these sources, I will exclusively focus on those concerning regular migration and residence in the Union.

²⁶¹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, O.J. L 251/12 of 3 October 2003.

²⁶² Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. L 16/44 of 23 January 2004.

²⁶³ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. L 158/77 of 30 April 2004.

²⁶⁴ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, O.J. L 155/17 of 18 June 2009.

²⁶⁵ Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, O. J. L 289 of 3 November 2005.

²⁶⁶ European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment of 13 July 2010, COM(2010) 379.

²⁶⁷ European Commission, Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer of 13 July 2010, COM(2010) 378.

²⁶⁸ Directive 2011/98/EC of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, O.J. L 343/1 of 23 December 2011.

With respect to the field of employment, another relevant regime consists in the anti-discrimination EU legal framework. The European legal framework on non-discrimination has been defined as a “fragmented body of law” both because it mirrors different conceptual approaches to non-discrimination and equality – especially in relation to positive action – and because of its diverse responses to different grounds of discrimination²⁶⁹. The main legal sources in this area are indeed quite diverse in scope and content. While Directive 2000/43²⁷⁰ focuses exclusively on race discrimination but includes a variety of realms within its scope of application, Directive 2000/78²⁷¹ aims instead at prohibiting discrimination on several grounds but exclusively in the field of employment. As to discrimination on the grounds of sex, the most important legal sources in force at the present time are constituted by Directive 2004/113²⁷², prohibiting sex discrimination with respect to access to and supply of goods and services in fields beyond employment²⁷³, and by Directive 2006/54²⁷⁴, focusing on equal opportunities and equal treatment between men and women in the field of employment.

The described normative system suggests that European Union law is comparable to Member States, in the sense that this entity establishes its own legislation with the aim to regulate immigration on its territory, and therefore its norms may have a disparate impact on immigrant women. At the same time, EU law has also established its own system of fundamental rights protection, acting as an external source of control *vis-à-vis* Member States’ domestic orders. In this sense, European Union law constitutes both a system of guarantee of immigrant women’s fundamental rights and a possible source of biased norms which, just like national norms, are subject to fundamental rights review.

European Union law may produce a disparate impact on immigrant women either as a direct result of discriminatory or biased norms, or because it fails to dictate appropriate

²⁶⁹ SCHIEK, D., ‘From European Union Non-Discrimination Law Towards Multidimensional Equality Law for Europe’, in Schiek, D., Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, 2009, p. 5.

²⁷⁰ Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O. J. L 180/22 of 19 July 2000.

²⁷¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O. J. L 303/16 of 2 December 2000.

²⁷² Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O. J. L 373/37 of 21 December 2004.

²⁷³ Article 3(4) of Directive 2004/113 explicitly provides that this source “shall not apply to matters of employment and occupation”.

²⁷⁴ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O. J. L 204/23 of 27 July 2006.

standards in relation to crucial aspects of immigrant women's family or working life in the European legal space. In the latter case, a key question concerns the possibility to conclude that certain norms of EU law breach immigrant women's fundamental rights because they leave Member States with a margin of discretion that may be exercised in a way that undermines said rights. This question has divided European institutions, as shown by the 2006 judgment of *Parliament v. Council* by the Court of Justice²⁷⁵. In this case, the European Parliament required the annulment of certain provisions of Directive 2003/86/EC²⁷⁶ which precisely relied on the observation that this source allows Member States to adopt domestic legislation that breaches fundamental rights and most importantly that "inasmuch as the Directive authorises such national legislation, it is the Directive itself which infringes fundamental rights"²⁷⁷. The European Council, on the other hand, argued that the provisions adopted and applied by Member States in breach of fundamental rights could not be considered as an action of European institutions, and that the Court of Justice could not possibly review the compatibility of the norms of the Directive "in purely abstract terms" since those norms refer to "national law whose content, and the manner in which it will be applied, are unknown"²⁷⁸. Ultimately, the Court of Justice endorsed the European Council's stance by observing that "while the Directive leaves the Member States a margin of appreciation, it is sufficiently wide to enable them to apply the Directive's rules in a manner consistent with the requirements flowing from the protection of fundamental rights"²⁷⁹ and that in any case when implementing EU law Member States "are bound, as far as possible, to apply the rules in accordance with those requirements"²⁸⁰.

However, in his Opinion on the case Advocate General Kokott expressed a partially dissenting stance on the matter²⁸¹. In support of the view expressed by the European Parliament and the European Commission, AG Kokott observed that "endorsement by

²⁷⁵ *Parliament v. Council* (Case C- 540/03, Judgment of 27 June 2006, ECR I-05769).

²⁷⁶ The judgment of *Parliament v. Council* concerned the alleged incompatibility of articles 4(1), 4(6) and 8 of Directive 2003/86 with children's right to respect for family life ex article 8 ECHR and 7 of the European Charter, with the best interest of the child ex article 24 of the European Charter as well as to the principle of non-discrimination enshrined in articles 14 ECHR and 21(1) of the Charter. The Court, in particular, was required to assess whether arts. 4(1) and 4(6) of Directive 2003/86/EC infringe these fundamental rights because they allow Member States respectively to verify whether children over the age of twelve meet integration conditions before allowing them to enter their territory for the purpose of family reunification, and to require applications for family reunification to be submitted only for children under the age of fifteen. Similar questions were also submitted with reference to the imposition of minimum waiting periods as a prerequisite to apply for family reunification pursuant art. 8 of the Directive.

²⁷⁷ *Parliament v. Council*, cit., § 15.

²⁷⁸ *Ibid.*, § 17.

²⁷⁹ *Ibid.*, § 104.

²⁸⁰ *Ibid.*, § 105.

²⁸¹ Opinion of Advocate General Kokott, *Parliament v. Council* (C-540/03, delivered on 8 September 2005).

Community law of specific options for maintaining in force or introducing provisions of national law constitutes a measure which may itself, in certain circumstances, infringe Community law”²⁸². AG Kokott’s motivations were very fitting. In my view, the main problem with the Court’s argumentation was the inevitable consequence to admit the possibility for Member States to maintain or adopt legal provisions for the purpose of complying with EU law which breach fundamental rights. AG Kokott effectively pinpointed this problem by observing that similar options for Member States “formally establish” that these national provisions “are compatible with Community law”, and that if said provisions “are not challenged in time by means of an action for annulment, the Community will be precluded from taking action itself against national measures which simply take advantage of the various options contemplated”²⁸³. In partial dissonance with the Parliament’s arguments, AG Kokott also raised the crucial point of interpretation. I very much share her view whereby “Community provisions are compatible with fundamental rights if they are capable of being interpreted in a way which produces the outcome which those rights require”²⁸⁴, and that therefore “what matters is not what rules Member States might be minded to adopt (...), but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights”²⁸⁵. In case EU norms were not sufficiently clear, and this ambiguity would give rise to a breach of human or fundamental rights, “responsibility would lie not only with the national legislature (...), but also with the Community legislature”²⁸⁶.

This illustration of the *Parliament v. Council* case serves to clarify the point of view that have chosen to adopt in this chapter’s analysis of the gendered shortcomings of European Union law. While I am aware of the European Court of Justice’s position on the matter, I argue that delegating to Member States the entire responsibility of an implementation of EU law respectful of immigrant women’s fundamental rights is an unsatisfactory solution. Because the specific difficulties of this group already tend to be overlooked by domestic legislation – as the previous chapter has shown in several instances – immigrant women are particularly in need of clear standards of protection of their rights at the supranational level. In this sense, the ambiguous and generic character of certain norms of EU law in critical areas for immigrant women’s right to family life and employment is problematic in itself and must

²⁸²*Ibid.*, § 45.

²⁸³*Id.*

²⁸⁴*Ibid.*, § 80.

²⁸⁵*Ibid.*, § 82.

²⁸⁶*Ibid.*, § 105.

be addressed. For these reasons, in this chapter I will adopt the same partially dissenting stance expressed by AG Kokott in *Parliament v. Council* and I will focus on two main aspects. On the one hand, I will discuss specific provisions of EU law as in breach of immigrant women's fundamental rights even when their gendered shortcomings are mainly identifiable in their excessively generic character in areas of particular importance to immigrant women. On the other hand, I will reason on the potential for future development of judicial interpretations by the European Court of Justice of biased norms of law on the grounds of fundamental rights, so as to correct said bias.

The aim of this chapter is thus to explore the interaction between European fundamental rights law and secondary norms of EU law applicable to this category. Firstly, I will delineate the right to family life and the right to employment as established and protected under European primary law, with a special focus on the Charter of Fundamental Rights of the European Union²⁸⁷. Then, I will move on to examine the main sources of European migration law (and other relevant sources of EU law) in order to assess whether the rights granted by such sources – in the fields of family and employment respectively – have so far lived up to the standards established by European fundamental rights law. In the field of family life, I will focus on the European family migration regime. In the field of employment, on the other hand, I will discuss the European labour migration regime as well as the anti-discrimination framework provided by EU secondary law. For each of the two domains of family life and employment, such analyses will consistently include an assessment of selected judgments by the European Court of Justice and of the eventual role played by European fundamental rights law in unveiling and correcting gendered shortcomings of norms of secondary EU law. Undoubtedly, the relatively recent role of the Court of Justice as a fundamental rights adjudicator constitutes an important development in this respect and has been widely commented on²⁸⁸. In addition to this, it is important to consider that the awaiting accession of the European Union to the European Convention on Human Rights, as envisaged by art. 1 of

²⁸⁷ Charter of Fundamental Rights of the European Union, O.J. C 83/389 of 30 March 2010.

²⁸⁸ See for instance MUIR, E., 'The European Court of Justice: a Fundamental Rights Institution Among Others', in Dawson, D., de Witte, B., Muir, E., (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, 2013, as well as JONES, J., 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice', 33 *Liverpool Law Review* (2012) 281. For a comparative analysis of the European Court of Justice's activity in the field of fundamental rights, see DE BÚRCA, G., 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *New York University Public Law and Legal Theory Working Papers*, Paper 420 (2013), as well as CARRERA, S., DE SOMER, M., PETKOVA, B., 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice', *CEPS Papers in Liberty and Security in Europe*, Paper n. 49 (2012).

the Lisbon Treaty and art. 59 of the European Convention itself (as amended by Protocol No. 14 of 2004)²⁸⁹, will further strengthen human rights protection in the European Union. On my part, in this chapter I aim to provide a fresh point of view on the Court's judicial activity in the field of fundamental rights, examining its gendered implications in cases concerning immigrants.

1. European Fundamental Rights in the Field of Work and Family: Significance for Immigrant Women in the European Legal Space

As is known, the Charter of Fundamental Rights of the European Union was solemnly proclaimed at the Nice European Council of 2000²⁹⁰, but only acquired a binding legal force in 2009 with its incorporation in the Treaty of Lisbon²⁹¹, whose art. 6(1) granted this source with the same legal value as the Treaties. Thus, the Charter has become the most important binding legal source of European law in the field of fundamental rights, although many of the rights recognised by the Charter have been actually de-fundamentalised because their specification and guarantee is delegated to national laws.

In any case, several of its provisions appear of interest for immigrant women's family life and employment. The Charter does not simply establish a right to family life and a right to work. Rather, the profiles of these two fundamental rights emerge from a systematic consideration of several other rights established by the Charter which can be gathered around two main "clusters" related to the realm of family and employment respectively. In particular,

²⁸⁹ Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, entered into force on 1 June 2010. Art. 17 of the Protocol indeed added a second paragraph to article 59 of the Convention, establishing that "The European Union may accede to this Convention". In turn, article 6(2) of the Treaty on the European Union as amended by the Lisbon Treaty provides that "[the] Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms", clarifying that "[such] accession shall not affect the Union's competences as defined in the Treaties".

In April 2013, the Council of Europe Steering Committee for Human Rights (composed of negotiators of the 47 Council of Europe member states) and the European Union finalised a draft agreement on the accession of the European Union to the European Convention on Human Rights (Council of Europe, *Fifth Negotiation Meeting Between the CDDH ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Final Report to the CDDH, 3-5 April 2013, Strasbourg, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) – last accessed on 12 February 2014). This marked another important stepping stone in the path towards accession.

²⁹⁰ Charter of Fundamental Rights of the European Union, O.J. C 364 of 18 December 2000.

²⁹¹ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, O.J. C 306 of 17 December 2007. Art. 1 of the Treaty indeed amended article 6(1) of the Treaty on European Union (O. J. C 191 of 29 July 1992) in order to grant the Charter with the "same legal values as the Treaties".

for the family domain I will focus on two main aspects: access to family reunification and enjoyment of spousal equality. These aspects have been chosen because they have been involved in an extremely significant case law by the European Court of Justice concerning third-country national carers and their possibility to enjoy family life with their children in the Union territory.

As for the employment domain, two main areas appear particularly interesting: access to employment and the enjoyment of equality and non-discrimination at work. These two areas have not been involved by the European Court of Justice's jurisprudence. In fact, the Court has yet to examine immigrant women workers' position in a fundamental rights perspective. However, I have chosen to analyse these interrelated aspects of the employment cluster because of the existence of interesting judicial examples of application of the EU anti-discrimination framework to immigrant women pursuing access to employment. These examples do not provide any cues as to the way in which the EU fundamental rights framework may play out in relation to immigrant women workers' situation. However, they provide important evidence as to the capability (or lack thereof) of EU anti-discrimination law to respond to immigrant women workers' complex experiences of discrimination, which often involve multiple or intersecting grounds.

a. Right to Family Life

In relation to immigrant women's family life, several fundamental rights established by the Charter appear to complete and specify the right to respect for family life established by article 7. Firstly, some of such rights aim at granting freedoms in relation to family life. Thus, article 9 establishes the fundamental rights to marry and to found a family, both of which "shall be guaranteed in accordance with the national laws governing the exercise of these rights". Secondly, several rights established by the Charter relate to the fundamental right to enjoy family life in conditions of equality and non-discrimination. Such provisions, while broad in character, also apply to the field of family and can be of particular importance for immigrant women. They include the right to equality before the law, established by art. 20, the principle of equality between men and women granted by art. 23, as well as the provision by art. 21 of a right to non-discrimination on a non-exhaustive lists of grounds – including sex, race, colour, ethnic or social origin, religion and language. In this respect, it is important to stress that art. 21(3) separately tackles discrimination on the grounds of nationality, prohibiting it only "within the scope of application of the Treaties and without prejudice to

any of their specific provisions”. Furthermore, art. 33(2) of the Charter recognises a fundamental right pertaining to both the family and the employment domains, i.e., the right to reconcile family and professional life. This right is specified in the “right to protection from dismissal for a reason connected with maternity” and in the “right to paid maternity leave and to parental leave following the birth or adoption of a child”.

A third bundle of provisions established by the Charter in relation to family life concerns access to fundamental rights that are functional to the enjoyment of the right to family life. For instance, article 33(1) establishes the right of the family “to enjoy legal, economic and social protection”, while article 33(2) grants every individual with the fundamental rights to “protection from dismissal for a reason connected with maternity” as well as to “paid maternity leave and to parental leave following the birth or adoption of a child”. Moreover, a particularly important provision for immigrant women is constituted by art. 24, which entitles children with a right “to such protection and care as is necessary for their well being” – art. 24(1) –, establishes an obligation to consider their best interest in all public or private actions relating to them – art. 24(2) - and, even more importantly for our purposes, establishes their right to “maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests” – art. 24(3).

b. Right to Work

The Charter establishes several rights in the field of employment in both its individual and collective dimensions. Firstly, in relation to the aim of protecting freedom in relation to employment, the Charter establishes two key fundamental rights, i.e., the prohibition of slavery, servitude, forced or compulsory labour and trafficking established by article 5 and the right “to engage in work and to pursue a freely chosen or accepted occupation” under art. 15. With respect to the right to work, article 15 also distinguishes between Union citizens and regularly residing third-country national workers. While indeed, the former are also granted by art. 15(2) with “the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State”, the latter are simply recognised with an entitlement “to working conditions equivalent to those of citizens of the Union” by art. 15(3). Art. 15 may therefore prove to be of little use for the protection of immigrant women workers against discrimination, at least with respect to citizen workers. The Charter, indeed, safeguards differential treatment on the grounds of nationality in the field of employment by clarifying that, while a right to engage in freely chosen work is recognised to

every individual unconditionally by article 15(1), the right to equal treatment with Union citizens in this field is only granted to third-country nationals that have been authorised to work in the Union and only as to working conditions (not access to employment). Similarly, article 21(2) of the Charter exclusively prohibits discrimination on the grounds of nationality “without prejudice to the special provisions of those Treaties”.

Secondly, the Charter establishes several fundamental rights related to workers’ protection in their employment relationships and their working conditions. Such a bundle of rights includes the fundamental right to vocational and continuing training under article 14, the right to access free placement services pursuant art. 29, the right to protection against unjustified dismissal “in accordance with Union law and national laws and practices” *ex* art. 30, as well as the entitlement to social security benefits and social services “providing protection in cases such as maternity, illness, industrial accidents, dependency or old age and in the case of loss of employment” in accordance with national and European law – pursuant art. 34(1). Arguably, such rights constitute an important safety net against dismissal, unemployment and redundancy because they foster requalification, re-entry into the labour market or simply because they ensure cumulative or alternative means of support to workers. As to working conditions, this very same bundle of rights also includes article 31, entitled “fair and just working conditions”, granting every worker with “the right to working conditions which respect his or her health, safety and dignity” and “the right to limitation of maximum working hours, to daily and weekly rest periods and to annual period of paid leave”.

Thirdly, several fundamental rights related to equality and non-discrimination established by the Charter also cover the field of employment. Among those, the mentioned rights to equality before the law *ex* art. 20 and to non-discrimination *ex* art. 21 adopt a broad language without specifying any particular field of application. On the other hand, in establishing the principle of equality between men and women, article 23 explicitly mentions “employment, work and pay” as included in its scope of application – as if to stress the particular importance of implementing sex equality in the field of employment.

Lastly, a bundle of rights established by the Charter involve the collective dimension of employment. Thus, article 27 establishes workers’ rights to information and consultation, while article 28 grants workers and employers with a “right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”. Also in connection to such rights to information, consultation, collective bargaining and action, the Charter also protects under its article 12 the freedom of assembly and of association “in particular in political, trade

union and civic matters, which implies the right of everyone to form and join trade unions for the protection of his or her interests”.

Having highlighted the most relevant aspects of European fundamental rights law in relation to immigrant women’s family life and employment, I will now turn to analyse European immigration law, evaluating whether and to what extent the contemporary sources of European immigration law have thus far lived up to immigrant women’s fundamental rights to family life and to employment as collectively constructed by several provisions of the Charter. While these sources grant important rights to third-country nationals residing and working in the European legal space, they may nonetheless present serious gendered shortcomings with respect to the specific issues that I have identified as disproportionately affecting immigrant women.

The next two sections of this chapter will be devoted to a critical assessment of relevant provisions of European immigration law in the fields of family life and employment respectively. In relation to the domain of family life, I will also analyse key judgments by the European Court of Justice interpreting and implementing these provisions, in an effort to answer the key question of whether EU fundamental rights law itself has so far been capable of exposing and correcting observable gendered shortcomings of European immigration law. In relation to the employment domain, on the other hand, I will focus more on the meaning of the selected judicial examples with respect to the responsiveness of secondary EU legislation on the right to non-discrimination to the specific issues experienced by immigrant women workers in the European Union.

2. European Family Migration Law in the Light of Immigrant Women’s Fundamental Right to Family Life

In this section, I will examine the relevant provisions of European immigration law that bear the potential to produce a disparate impact on immigrant women’s enjoyment of their right to family life as enshrined in several articles of the European Charter. The gendered shortcomings of these norms do not derive from their regulation in itself, but rather from the vast discretionary power left to Member States in crucial areas of immigrant women’s family life. By doing so, such norms fail to establish minimum standards that would secure this category’s equal enjoyment of their fundamental right to family life in the European legal space. As a result, in several respects the rights granted by secondary sources of European

immigration law fall short of the protection guaranteed by the Charter. In this section, I will discuss this issue in more depth with reference to the economic prerequisites to sponsor family reunification and to the dependence of residence permits for family reunification on that of the sponsor. This analysis will also include an enquiry into the capability of the fundamental rights framework provided by the European Charter to restrict Member States' vast discretionary power in these sensitive areas. In particular, I will turn to examine relevant judgments by the European Court of Justice in order to understand whether and to what extent said fundamental rights have been enforced in relation to these matters – and if so whether they have been used by the Court to address state implementation of EU immigration law in a more gender-sensitive direction.

a. Access to Family Reunification

Depending on the nationality of their spouses, partners and children as well as on the residence status of the involved persons, immigrant women's access to family reunification, i.e., their enjoyment of family life with their family members in the host country, is regulated by different provisions of European immigration law. In this paragraph I am going to focus on immigrant women's access to family reunification as sponsors, while the following one will be devoted to immigrant women as sponsored family members.

When applying to sponsor family reunification, one of the most problematic legal provisions for third-country national immigrant women residing in the Union concerns the imposition of economic requirements as a precondition for enjoying family life with spouses, partners or children in the host country. On the one hand, such requirements pursue a fundamental interest of the host state, i.e., the necessity to ensure that incoming family migrants will not burden the national social assistance system, with the view to preserve and administer limited national resources. The legitimate character of Member States' pursuit of these interests is unquestionable. On the other hand, however, an exclusive focus on productive work and economic thresholds as the only way to satisfy preconditions for the enjoyment of family life in the host country bears disproportionate and negative effects on immigrant women's possibilities to access family reunification as sponsors.

The majority of the relevant norms of European immigration law in this area appear to reproduce the criticised focus. Immigrant women aiming to sponsor family reunification will have to comply with the requirements of Directive 2003/86, of Directive 2003/109, or of

Directive 2009/50 depending on the type of permit they hold and on the exercise of their eventual freedom of movement within the Union.

Directive 2003/86 – whose article 4 exclusively grants a right to reunification with “the sponsor’s spouse”²⁹² as well as several categories of minor children²⁹³ – at article 7 allows Member States to require that the sponsor provides evidence of having an accommodation “regarded as normal for a comparable family in the same region”²⁹⁴, sickness insurance for himself or herself and his family members, as well as “stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, without recourse to the social assistance system of the Member State concerned”²⁹⁵. In this respect, article 16(1)(a) establishes that a renewal of the residence permit for the purpose of family reunification may be rejected by the Member States if the sponsor no longer has sufficient resources without recourse to the social assistance system of the host Member State, as referred to by article 7.

Directive 2003/86 also applies to long-term residents’ family members entering the Member State where their sponsor resides. However, art. 16 of Directive 2003/109 also grants long-term residents with a right to be accompanied by their family members – already residing in the Member State in accordance with Directive 2003/86 – when exercising their right to reside in a second Member State²⁹⁶. For this different type of family migration, article 16 requires family members to apply for another residence permit in the second Member State. Interestingly, while also establishing income requirements as a precondition for obtaining such permits, art. 16 refers them alternatively to the family member and to the sponsor rather than just the latter as is the case of Directive 2003/86. More specifically, article 16(4)(c) of Directive 2003/109 allows the second Member State to require, among other

²⁹² See article 4(1)(a) of Directive 2003/86.

²⁹³ Letters (b), (c), and (d), of article 4(1) establish a right to family reunification with minor children of the sponsor and his or her spouse, with minor children of the sponsor when the latter has custody and the children are dependent on him or her, and with the minor children of the sponsor’s spouse when the latter has custody and the children are dependent on him or her. Beyond these categories of family members, article 4(3) of Directive 2003/86 establishes that “Member States *may* [emphasis added] (...) authorise the entry and residence (...) of the unmarried partner, being a third country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third country national who is bound to the sponsor by a registered partnership (...)”.

²⁹⁴ See article 7(1)(a) of Directive 2003/86.

²⁹⁵ See article 7(1)(c) of Directive 2003/86.

²⁹⁶ Art. 16 of the Directive establishes a distinction between family members depending on whether the family was already constituted in the first Member State or not. In the latter case, art. 16 (5) entirely refers to the rules established by Directive 2003/86. In the former case, art. 16(1) establishes an obligation for the second Member State to authorise spouses and minor children – as defined by article 4(1) of Directive 2003/86 – to accompany or join the long-term resident, while the admission of other relatives is left by article 16(2) to the discretionary power of the second Member State.

conditions, family members to provide “evidence that they have stable and regular resources to maintain themselves without recourse to the social assistance of the Member State concerned or that the long-term resident has such resources and insurance for them”.

Lastly, article 15 of the Blue Card Directive grants third-country nationals holding this permit with the right to family reunification as envisaged by Directive 2003/86 with several more favourable derogations that do not touch upon income requirements. In addition to this, it must be noted that the very scope of application of the Blue Card Directive is dependent on stringent income requirements. Pursuant article 5(3) of the Directive, indeed, the Blue Card will only be released provided that “the gross annual salary resulting from the monthly or annual salary specified in the work contract or binding job offer shall not be inferior to a relevant salary threshold (...) which shall be at least 1,5 times the average gross annual salary in the Member State concerned”²⁹⁷.

The European normative framework on sponsorship of family reunification suggests that Directive 2003/109 may be the only legal source actually envisaging the possibility that family members may be able to maintain themselves from the very beginning of their movement rather than relying on their sponsor for subsistence – although exclusively in the case of movement of the long-term resident sponsor in another Member State. On the other hand, Directive 2003/86 – which still constitutes the general legal framework on third-country national’s enjoyment of family unity – appears to be heavily based on the possibility for Member States to impose preconditions related to income and productive work. It appears disappointing that Directive 2003/86 fails to refer at least to an obligation for Member States to consider the personal circumstances of the sponsor in their evaluation of his or her application for family reunification. Far from being merely hypothetical, this observation stems from a comparison with Directive 2004/38. The latter resource, indeed, establishes by its article 8(4) a prohibition for Member States to set fixed amounts for the purpose of determining “sufficient resources”, as well as an obligation to take into account “the personal situation of the person concerned”. Clearly, there would be no guarantee that these “personal circumstances” would be interpreted in favour of immigrant women aspiring to sponsor family reunification – e.g., by setting lower income standards for immigrant women in consideration of the disproportionate impact of the gender pay gap on this category in comparison to national women workers. However, a similar provision bears at least the

²⁹⁷ Such a threshold may be lowered to 1.2 times the average gross salary in the Member State concerned for specific professions “in particular need of third-country national workers”, ex art. 5(5).

potential to produce positive effects for immigrant women's equal access to sponsorship of family reunification.

The vast discretion left to Member States by Directive 2003/86 as to the possibility of imposing strictly economic requirements to third-country nationals pursuing to sponsor family reunification regardless of their personal situation and of the eventual income of other family members is likely to produce a disparate impact on immigrant women in the enjoyment of their right to family life. In particular, I would argue that this feature may be at odds with an organic reading of the Charter whereby the right to protection of family life ex art. 7 shall be guaranteed in conjunction with the principles of equality and non-discrimination affirmed by the Charter at arts. 20, 21 and 23 – particularly with respect to the prohibited ground of sex, provided that the latter group of articles may be interpreted as also encompassing a prohibition of indirect discrimination. The possibility for such an interpretation is suggested by the Explanations to the Charter drafted by the Presidium of the Convention which drafted this source²⁹⁸, whereby art. 21(1) draws on article 19 of the Treaty on the Functioning of the European Union and article 14 of the European Convention on Human Rights. As I have previously stressed, the latter has been interpreted by the European Court of Human Rights as also including a prohibition of indirect discrimination within its scope. On this ground, and even more so in consideration of the imminent accession of the European Union to the European Convention on Human Rights, it appears realistic to pursue and support an interpretation at least of art. 21 of the Charter as covering both direct and indirect discrimination.

In consideration of immigrant women's disproportionate difficulties in complying with income requirements, a reading of the legal framework at issue in the light of these fundamental rights may prompt the recognition of the indirectly discriminatory character of provisions allowing Member States to impose purely economic requisites for the purpose of enjoying family life on their territory. This framing of the current European family reunification regime may prompt the adoption of more gender-sensitive standards in this context. These may include Member States' possibility – or even obligation – to consider whole families' income rather than requiring a single sponsor to support herself and the family member for which reunification is sought. This solution would prompt a legal recognition of the value of reproductive and care work within the household in the context of

²⁹⁸ Explanations Relating to the Charter of Fundamental Rights, O.J. C 303/17 of 14 December 2007. Although the Explanations do not have the status of law, they have been drafted with the aim of providing a useful tool of interpretation of the Charter.

sponsorship for family reunification which would arguably constitute a key development for immigrant women's equal enjoyment of their right to family life.

While the negative outcome of the *Haydarie* judgment²⁹⁹ before the Strasbourg Court suggests cautiousness in considering human and fundamental rights as a cure-all in this area, the isolated nature of this case as well as the fact that the Court of Justice has yet to analyse this specific matter³⁰⁰ leave grounds for possibly positive developments in the near future. An important encouragement in this respect comes from a group of judgments by the European Court of Justice whereby third-country national women were recognised with a right to enjoy family life with their Union citizen spouses or children in their host countries, although beyond the framework of Directive 2003/86. In these cases, the fundamental right to family life of the involved immigrant women was not the focus of the Court's judicial reasoning. Rather, its protection constituted an indirect effect of the primary aim of ensuring the effective enjoyment by Union citizen spouses and children of their own fundamental rights and freedoms. The most interesting aspect of such a case law for the purpose of this section consists in the fact that this indirect effect was mainly grounded on the reproductive work and unpaid care labour of the involved third-country national women, which was considered by the Court as an indispensable support for the full enjoyment of their husbands' and children's fundamental rights as citizens of the Union. Thus, the judicial valorisation of unpaid care and reproductive work as a ground to access the fundamental right to family life may suggest a stronger sensitivity of the ECJ (in comparison to that shown by the Strasbourg Court in *Haydarie*) on these matters, which may ground a favourable assessment of the right to sponsor family reunification also beyond a mere breadwinner logic.

²⁹⁹ *Haydarie v. the Netherlands*, cit.

³⁰⁰ On a broader level, very few judgments of the Court in the field of family migration were grounded on Directive 2003/86. Aside from cases concerning the non-transposition of the Directive by some Member States, the most important cases in this respect were *O. and S.* (joined cases C-356/11 and C-357/11, *O. and S.*, judgment of 6 December 2012, not yet published in ECR), *Chakroun* (Case C- 578/08, Judgment of 4 March 2010, ECR I-01839) and the already cited *Parliament v. Council*. In *O. and S.*, the Court established Member States' obligation to exercise the faculty to require stable and regular resources to prospective sponsors - envisaged by art. 7(1)(c) of Directive 2003/86 - in the light of the fundamental right to respect for private and family life and the best interest of the child, protected by articles 7, 24(2) and 24(3) of the Charter. With the *Chakroun* judgment, the Court clarified the meaning of the phrase "recourse to the social assistance system" ex article 7(1)(c) of Directive 2003/86, specifying that this expression does not allow Member States to deny family reunification if the sponsor can support his or her family but will be entitled to claim special assistance to meet exceptional, determined and essential living costs.

A closer look at the specific judgments at issue is however required before reaching such conclusions. In the case of *Carpenter*³⁰¹, concerning a Philippines national illegally residing in the United Kingdom and married to a British national, the Court of Justice interpreted Directive 73/148/EEC³⁰² (at the time regulating the exercise by Union citizens of their freedom of movement, and subsequently repealed by Directive 2004/38) in the light of Union citizens' fundamental rights and freedoms. In particular, the Court referred to freedom to provide services within the Union under article 49 of the EC Treaty³⁰³ and of Union citizens' right to respect for family life *ex* article 8 of the European Convention on Human Rights. The aim of this judicial interpretation was to answer the question of whether a right of residence for a third-country national spouse could be recognised "if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare"³⁰⁴. Thus, the Court interestingly held that "the separation of Mr and Mrs Carpenter would be detrimental to their family life, and, therefore, to the conditions under which Mr Carpenter [exercised] a fundamental freedom", because "[that] freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles (...) to the entry and residence of his spouse"³⁰⁵. As to the Union citizen husband's right to respect for family life, the Court observed that "[the] decision to deport Mrs Carpenter [constituted] an interference with the exercise *by Mr. Carpenter* [emphasis added] of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms"³⁰⁶. As a result, the Court exclusively referred to the husband's human rights and fundamental

³⁰¹ Case C-60/00 *Carpenter*, Judgment of 11 July 2002, ECR-I 6305.

³⁰² Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, O.J. L 172, 28 June 1973, p. 14 – 16.

³⁰³ Article 49(1) TEC provided that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended".

³⁰⁴ European Court of Justice, *Carpenter*, cit., § 20. Mrs Carpenter, in particular, submitted that while Mr Carpenter often travelled to other Member States for business reasons, she stayed at home and looked after his children from a previous marriage. She had argued before the national authorities that her deportation would not only affect her right to reside in the United Kingdom as the spouse of a British national, but also her husband's right to exercise his freedom to provide services within the territory of the Union. Before the ECJ, Mrs Carpenter reiterated that "she [had] no right of her own to reside in any Member State but (...) that her rights [derived] from those enjoyed by Mr Carpenter to provide services and to travel within the European Union" (*Carpenter*, cit., § 21). Such an argument shifted the Court's attention to the inconvenience that Mrs Carpenter's expulsion would cause to Mr Carpenter's business, because "her deportation would require [him] to go to live with her in the Philippines or separate the members of the family unit if he remained in the United Kingdom, [but in] both cases Mr Carpenter's business would have been] affected" (*Ibid.*).

³⁰⁵ *Ibid.*, § 39.

³⁰⁶ *Ibid.*, § 41.

freedoms when it concluded that “Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal by the Member State of origin of a provider of services (...) of the right to reside in its territory to that provider’s spouse, who is a national of a third country”³⁰⁷.

Similarly, in the *Baumbast and R.*³⁰⁸ judgment the Court of Justice recognised a Colombian woman’s right to reside in the United Kingdom on the grounds of an interpretation of Regulation 1612/68³⁰⁹ in light of her children’s right to pursue education in their host state, which in turn was extracted by the Court from their Union citizen father’s fundamental freedom to circulate within the Union as a worker under article 39 EC³¹⁰. The Court reached this conclusion even if the Union citizen father no longer exercised freedom of movement as a worker. The Court in particular observed that “where the children enjoy (...) the right to continue their education in the host Member State although the parents who are their carers are at risk of losing their right of residence as a result (...) of the fact that the parent who pursued the activity of an employed person in the host Member State (...) has ceased to work there, it is clear that if those parents were refused the right to remain in the host Member State during the period of their children’s education that might deprive those children of a right which is granted to them by the Community legislature”³¹¹. In this case therefore, not only was a third-country national woman once again granted with the possibility to enjoy family life in her host country with her spouse and children solely on the grounds of the “usefulness” of her care work for Union citizen children, but the framing of her fundamental right to family life as purely functional to the enjoyment of other individuals’ rights was also aggravated by the third-hand character of such a right, which had been “passed on” from her husband to her children, and from her children to her.

Interestingly, in the subsequent case of *Zhu and Chen*³¹² the Court interpreted Directive 73/148/EEC as demanding the recognition of the right of a third-country national immigrant

³⁰⁷ *Ibid.*, § 46.

³⁰⁸ Case C- 413/99, *Baumbast and R.*, judgment of 17 September 2002, ECR I-07091.

³⁰⁹ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 of 19 October 1968. This source was subsequently amended by Directive 2004/38.

³¹⁰ With respect to the link between the children’s right to pursue an education in the host country and their Union citizen father’s freedom of movement, the Court observed that “to prevent a child of a citizen of the Union from continuing his education in the host Member State by refusing him permission to remain might dissuade that citizen from exercising the rights to freedom of movement laid down in Article 39 EC and would therefore create an obstacle to the effective exercise of the freedom thus guaranteed by the EC Treaty” (*Baumbast and R.*, cit., § 52).

³¹¹ *Baumbast and R.*, cit., § 71.

³¹² Case C-200/02, *Zhu and Chen*, Judgment of 19 October 2004, ECR I-9951.

woman to reside in the United Kingdom together with her baby daughter in the light of the latter's right to reside on the territory of Member States as a Union citizen *ex art. 18* of the EC Treaty – not only on the grounds of the mother's unpaid reproductive work, but also on the grounds of her productive and paid work. The order for reference in the case at issue, indeed, highlighted that the applicant mother – a Chinese woman working in China with her husband who had taken up residence in Ireland and had given birth there – was the primary carer of her daughter not only by virtue of her reproductive work but also on the grounds of her productive work, since her daughter was “dependent *both emotionally and financially* on her mother [emphasis added]”³¹³ and she received “private medical services and child-care services *in return for payment* in the United Kingdom [emphasis added]”³¹⁴.

The fundamentally functional character of the rights recognised to third-country nationals related to Union citizens was not eliminated by the subsequent de-linking of said rights from Union citizens' exercise of the freedoms attached to Union citizenship. Such a de-linking occurred for the first time in the landmark *Zambrano* judgment³¹⁵, concerning a married couple of Colombian nationals irregularly residing in Belgium and pursuing residence permits in their host country on the grounds of the Union citizenship of their children. Nonetheless, as in the previous case law of the Court, the parents' right to reside and work in Belgium in this case was also strictly functional; ensuring the possibility of their children to exercise their rights and freedoms as Union citizens. The persistently strict functionality of the fundamental rights granted to third-country nationals “attached” to Union citizens for the latter's exercise of their own rights has been subsequently confirmed by the Court in the judgments of *McCarthy*³¹⁶, *Dereci*³¹⁷, *O. and S.*³¹⁸ and *Alokpa and Moudoulou*³¹⁹.

The examined case law constitutes an important example of judicial interpretation by the ECJ of EU family migration norms in the light of fundamental rights and freedoms enshrined in primary and secondary EU law. In this respect, it is also noteworthy that in the cases of

³¹³ *Ibid.*, § 13.

³¹⁴ *Id.*

³¹⁵ Case C-34/09, *Ruiz Zambrano*, judgment of 8 March 2011, ECR I-01177.

³¹⁶ Case C-434/09, *McCarthy*, judgment of 5 May 2011, ECR I-03375.

³¹⁷ Case C-256/11, *Dereci et al.*, judgment of 15 November 2011, ECR I-11315.

³¹⁸ Joined cases C-356/11 and C-357/11, *O. and S.*, cit. The *O. and S.* case concerned two families in very similar conditions, whereby two third-country national immigrant women with a right of permanent residence in Finland had had children with Finnish men that they subsequently divorced. These children had acquired Finnish, and thus Union, citizenship. Subsequently, both women had married third-country national immigrant men and had had children with them. When these men had applied for a residence permit, their applications were rejected on the grounds that they could not count on sufficient means of subsistence.

³¹⁹ Case C-86/12, *Alokpa and Moudoulou*, judgment of 10 October 2013, not yet published in ECR.

Carpenter and *Baumbast* the Court explicitly recalled the right to respect for family life *ex* article 8 of the European Convention on Human Rights as a parameter for assessing relevant norms of migration law – opening up important perspectives for a joint interpretation of European fundamental rights and the human rights established by the European Convention.

The growing tendency to link access to EU fundamental rights and Union citizenship is not exclusive to the family migration realm. Such a tendency has been commented on, on a broader level, by scholars who have emphasised that although the Strasbourg Court has exclusively focused on human rights in relation to cases brought by immigrants, the European Court of Justice “has so far adopted the nationality/citizenship lens to deal with rights of non-EU citizens”³²⁰. As a result, a “stratification of rights”³²¹ has been created, whereby “[there] is a hierarchy of legal residents within the EU, with the Union citizens at the apex and the TCNs with no connection with EU citizens at the bottom of the ladder”³²².

Such effects of stratification of rights have not discouraged proponents of an even tighter link between Union citizenship and European fundamental rights. In fact, in the light of the observation of the weak role played so far by the European Union in relation to fundamental rights violations within Member States³²³, it has been proposed that a possible solution may lie in the identification of the fundamental rights recalled by art. 2 TEU³²⁴ with the substance of Union citizenship. More specifically, it has been suggested that the substance of the rights conferred by virtue of the Union citizen status should be understood as corresponding to “the essence of fundamental rights enshrined in Article 2 TEU”³²⁵. In the proponents’ view, this would support individual legal action before the European Court of Justice for the protection of human rights on the grounds of Union citizenship, intensifying the judicial activity of the Court in this field. In response to the objection that this construction would exclude third-

³²⁰ MORANO-FOADI, S., ANDREADAKIS, S., ‘The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and ECtHR Jurisprudence’, 22(4) *The European Journal of International Law* (2011) 1071, p. 1072. While the authors mostly refer to the European Court of Justice’s case law on the expulsion of third-country nationals from the territory of the Union, the cited observations are also applicable to the Court’s treatment of third-country national immigrants in general.

³²¹ *Ibid.*, p. 1076.

³²² *Id.*

³²³ VON BOGDANDY, A., KOTTMANN, M., ANTPÖHLER, C., DICKSCHEN, J., HENTREI, S., SMRKOLJ, M., ‘Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States’, 49 *Common Market Law Review* (2012) 489, p. 490.

³²⁴ Art. 2 of the Treaty on European Union states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”, identifying these values as “common to the Member States in a society in which pluralism, non-discrimination tolerance, justice, solidarity and equality between women and men prevail”.

³²⁵ Von Bogdandy, A., Kottmann, M., Antpöhler, C., Dickschen, J., Hentrei, S., Smrkolj, M., ‘Reverse Solange’, *cit.*, p. 491.

country nationals – especially considering that most provisions of the European Charter grant fundamental rights regardless of Union citizenship – it has been argued that in situations falling within the scope of EU law, this category may always rely on the Charter’s rights, and that in any case third-country nationals would indirectly benefit from a stronger protection of EU citizens’ rights³²⁶.

However, restricting the possibility to introduce individual legal action to Union citizens only, in an effort to increase the ECJ’s judicial activity in the field of human and fundamental rights, constitutes a questionable approach in my view. It would be far-fetched to maintain that either Member States individually or the European Union as a whole are under an obligation to grant equal rights to Union citizens and to third-country nationals in all respects. The choice to grant a privileged status to Union citizens – and its collateral effect of granting such a status only to third-country nationals somehow linked to them – pertains to the legislative powers of the Union. Nonetheless, it must also be acknowledged that both doctrinal and normative approaches linking Union citizenship and the possibility to obtain judicial protection of one’s fundamental rights creates perverse effects for third-country nationals in general and for immigrant women in particular. It is in my view crucial to highlight such issues not because of moral reasons, but because these perverse effects may not correspond to the aim pursued by the legislation generating them. From a theoretical point of view, I would argue that it is precisely by overlooking this aspect that one may affirm that exclusively allowing Union citizens to pursue individual legal action to obtain protection of their human and fundamental rights would not negatively affect third-country nationals³²⁷.

Therefore, it is extremely important to consider that such legislative choices, while legitimate, create unforeseen effects on third-country national immigrant women. While some of these effects may be seen as a positive development for this category, a look at the broader picture reveals serious and perverse effects which may prompt a re-thinking of European legislative and policy choices in the field of family migration.

On the one hand, one may argue that the inclusion under the EU fundamental rights regime of third-country national women on the grounds of their care and reproductive work constitutes progress. The analysed case law may even be considered as a good example of how third-country nationals may benefit from a better protection of Union citizens’ fundamental rights and freedoms. In this light, it may be concluded that the ECJ is capable of

³²⁶ *Ibid.*, p. 517.

³²⁷ *Ibid.*, p. 516.

supporting a stronger and more gender-sensitive consideration of this type of labour in EU migration regimes – including their specific provisions on requisites for sponsoring family reunification. From a gendered point of view, in fact, judgments such as *Chen* and *Baumbast* have been welcomed as recognising “the role of women as prime carers”, and as enriching “European social citizenship by performing a sort of judicial gender mainstreaming”³²⁸.

On the other hand, it is important to observe that the Court’s case law on the matter also presents gendered shortcomings. Firstly, this judicial approach constitutes a testimony of the increasingly narrow routes available to third-country national immigrant women to access fundamental rights in the field of family migration. Secondly, linking access to fundamental rights for third-country national women to their “usefulness” for the exercise of their spouses and children’s exercise of their own fundamental rights and freedoms has problematic gendered undertones. If an element of valorisation of unpaid care work is certainly observable in the examined case law, such care is not valued *per se*, as a sufficient ground to access fundamental rights *vis-à-vis* restrictive norms of immigration law. Rather, unpaid care work has been valued by the Court only in so far as it serves the purpose of allowing others to exercise their rights and freedoms as Union citizens. Far from enjoying a mere symbolic value, this judicial framing of care poses the crucial question of the fate of the residence rights granted to the third-country national women involved once their care work is no longer considered useful or vital for their spouses’ and children’s fundamental rights. In particular, an important question concerns whether these women will still enjoy residence rights strictly connected to their fundamental right to family life once their children reach adulthood and no longer need their care, or in case their marriage with citizen husbands comes to an end or when the latter no longer need to rely on their spouse’s care work in order to efficiently perform productive work.

Lastly, an important consequence of the link between third-country national women’s rights and Union citizenship lies in the fact that a similar protection is not granted to those married to third-country nationals. In this respect, it has been rightly noted that linking immigrant women’s access to fundamental rights to their attachment to Union citizens creates “differentiated legal subject[s]”³²⁹ by privileging this category at the expenses of those who cannot rely on similar links. In particular, it has been highlighted that “migrant women who are mothers of EU citizens enjoy more social citizenship rights than migrant women who are

³²⁸ KONSTA, A., ‘Gender and “Plastic Citizenship” in European Social Law’, in Moreau, M. (ed.), *Before and After the Economic Crisis: What Implications for the ‘European Social Model’?* 129, Edward Elgar Publishing Limited, Cheltenham, United Kingdom, 2011, p. 134.

³²⁹ *Id.*

not mothers of EU citizens”³³⁰. As it emerged from the examined case law, the same differentiation occurs with respect to immigrant women married with children to Union citizens *vis-à-vis* those married to third-country nationals.

Against this background, while the extension to third-country national immigrant women of fundamental rights and freedoms of Union citizens *vis-à-vis* restrictive norms of European immigration law on the grounds of their unpaid care labour prompted positive judicial outcomes for the migrant mothers and wives involved in the examined case law, the gendered shortcomings of this form of protection of immigrant women’s right to family life are evident. Arguably, the highlighted limitations also pose the problem of immigrant women’s enjoyment of equality within the family. In particular, the judicial recognition of immigrant women’s residence rights as strictly related to the usefulness of their reproductive and care work for Union citizen men and their children raises doubts as to the ECJ’s capability to move beyond a gendered view of the distribution between productive and reproductive work within the family. This observation prompts the question of what perspectives are currently opened by European family migration law for immigrant women’s enjoyment of sex equality within the family, and what influence the Charter may have on this matter. With that in mind, I will now turn to examine relevant norms of European immigration law from the point of view of spousal equality as a specific facet of the fundamental right to family life enshrined in the Charter.

b. Enjoyment of Spousal Equality and Equality Within the Family

One of the most important aspects for the enjoyment of equality within the family in the context of family migration legal regimes consists in the degree of independence granted to family members entering for the purpose of family reunification. The relation between the validity of the family member’s residence permit and the persistence of the relationship on which family reunification is grounded, or the presence of legal requirements of cohabitation as proof of a genuine family relationship for the purpose of maintaining residence permits are among the indicators of the degree of independence established by family reunification regimes.

³³⁰ *Ibid.*, pp. 134-135.

The importance of these features from a gendered point of view relates to their disproportionate impact on immigrant women as a category still predominantly entering Europe for family reasons. Restrictive norms establishing a strong link between family members' and sponsors' residence permits may further aggravate the factual dependence implied in entering a foreign country where the sponsor constitutes the only reference. In this respect, in 2007 the European Women's Lobby (EWL) identified the dependent legal status of immigrant women from their husbands in case of family reunification among the obstacles to their empowerment³³¹.

A gendered analysis of the European immigration law in this area, in the light of immigrant women's fundamental right to family life under the Charter as also encompassing spousal equality, offers mixed results. For the purpose of this section, I will look at relevant EU immigration law provisions applicable to third-country national immigrant women entering the European territory to join a previously resident family member (with a special focus on reunification with spouses). Third-country national women holding a residence permit for the purpose of family reunification with Union citizen family members enjoy quite secure, and to a certain extent independent, residence rights under Directive 2004/38. In particular, article 12(2) of the Directive establishes that "(...) the Union citizen's death shall not entail loss of the right of residence of his/her family members who are not nationals of a Member State" provided that they have resided in the host Member State for at least one year before the citizen's death. Even more importantly, the same provision is repeated by article 13 with respect to cases of "divorce, annulment of marriage or termination of the registered partnership", provided that the marriage or registered partnership has lasted at least three years, including one year in the host Member State, or that the third-country national spouse has custody of the Union citizen's children or enjoys a right to access to a minor child in the host Member State, or that "this is warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting". In both cases (death of the Union citizen ex art. 12 or divorce, separation or termination of partnership ex art. 13), third-country national spouses or partners may even acquire permanent residence in the host Member State provided that they satisfy the same

³³¹ European Women's Lobby, *Equal Rights, Equal Voices: Migrant Women in the European Union*, 19-21 January 2007, p. 21.

requirements imposed by article 7(2) to Union citizens to acquire a right of residence in another Member State for more than three months³³².

It appears to be particularly noteworthy that the requirement of a minimum duration of the marriage by article 13(2)(a) refers to the initiation of divorce proceedings as the reference moment for determining the termination of said marriage – rather than, for instance, an eventual interruption of cohabitation or other circumstances. An even more visible protective scope characterises article 13(2)(b) and (c) – which establish that regardless of the duration of the marriage and partnership, third-country national spouses or partners cannot be expelled from the host Member State when they have parental responsibilities or when they are victims of domestic violence.

Moving on to third-country national immigrant women holding residence permits on the grounds of family reunification with third-country national family members, Directive 2003/86 establishes an extremely problematic interdependence between the family member's permit and the sponsor's permit. Indeed, if article 13(3) provides that “[the] duration of the residence permits granted to the family member(s) shall in principle not go beyond the date of expiry of the residence permit held by the sponsor”, articles 15(1) and 15(4) grant a wide discretionary power to Member States concerning spouses' entitlement to an independent residence permit. They indeed allow Member States to withhold the granting of independent permits for up to five years of residence, and leaving the determination of the conditions for the granting and duration of said independent permit entirely to Member States. Moreover, the second indent of article 15(1) also provides that “Member States may limit the granting of the [independent] residence permit (...) to the spouse or unmarried partner in cases of breakdowns of the family relationship”. With respect to the spouse's possibility to obtain an independent permit before the five year-period allowed for by article 15(1), article 15(3) envisages a simple faculty for Member States to grant said permit “in the event of widowhood, divorce, [or] separation”. Although no clear mention of cases of domestic violence is present in the provisions of the Directive, article 15(3) also establishes an obligation for Member States to “lay down provisions ensuring the granting of an autonomous residence permit in the event of particularly difficult circumstances”.

³³² That is, they would have to show that they are workers or self employed persons, or that they have sufficient resources for themselves and their family members not to become a burden for the social assistance system of the host Member State as well as sickness insurance, or that they are members of the family of a person satisfying said requirements, provided that said family is already constituted in the host Member State. For the literal provisions, see arts. 12(2) and 13(2) of Directive 2004/38.

In connection with the heavy dependence between permits allowed for by Directive 2003/86, it is also important to stress that its article 16 establishes three very problematic hypotheses where Member States are allowed to withdraw or refuse to renew spouses' residence permits. The first case is envisaged by article 16(1)(b) and concerns a situation "where the sponsor and his/her family member(s) do not or no longer live in a real marital (...) relationship". The second case is described by article 16(1)(c) and occurs when "it is found that the sponsor or the unmarried partner is married or is in stable long-term relationship with another person". The third hypothesis subsists, pursuant to article 16(3) "where the sponsor's residence comes to an end and the family member does not yet enjoy an autonomous right of residence under Article 15".

The mentioned provisions of Directives 2004/38 and 2003/86 have the potential to strongly influence immigrant women's equality within the family. It appears clearly that all of the Directives' provisions concerning the dependence of family members' permits on conditions that the sponsor can satisfy, and in some cases from the unilateral behaviour of the sponsor, have a strong link with the possibility for immigrant women to establish equal relationships with their spouses or partners. Interestingly, after the adoption of Directive 2003/86 the Parliamentary Assembly stressed in Recommendation 1732(2006)³³³ the importance of granting independent permits in the context of family reunification with specific reference to the aim of "strengthening protection of the fundamental rights of immigrant women"³³⁴. In particular, the Assembly encouraged the "granting of an independent legal status to immigrant women having joined a principal right-holder, if possible within no more than one year from the date of their arrival"³³⁵.

In fact, third-country national spouses seem to be granted with much weaker protections against expulsion by Directive 2003/86 than by Directive 2004/38. While the latter grants a certain level of legal certainty to this category after a determined period of residence and relationship with a Union citizen, the same cannot be said for the former source. Directive 2003/86 indeed leaves a vast discretionary power to Member States concerning whether or not to grant an independent permit to spouses in events such as widowhood, divorce, or separation.

³³³ Parliamentary Assembly of the Council of Europe, Recommendation 1732(2006) on the Integration of Immigrant Women in Europe, adopted on 24 January 2006.

³³⁴ *Ibid.*, § 5.2.

³³⁵ *Ibid.*, 5.2.1.

Even more problematically from this point of view, third-country national spouses under the scope of Directive 2003/86 do not appear to be granted with any kind of right of residence in their host State in case of interruption of cohabitation. This type of provision deprives spouses of the possibility of leaving the conjugal home – for instance in order to withdraw themselves from domestic violence without pressing official charges, but also simply to experience a period of separation or to access employment elsewhere – without the fear of losing their residence permit and thus risk expulsion. Moreover, it leaves spouses without any kind of legal protection in case of abandonment by their sponsor partner. Lastly, such a lack of recognition of an independent right of residence also deprives immigrant women of any leverage concerning an eventual decision of their sponsor partner to leave the host Member State to emigrate elsewhere. If such a decision occurs before the five-year period allowed for by Directive 2003/86, immigrant women holding a permit for family reunification will be presented with the choice to follow their partners or lose their residence permit in the host Member State. It should be noted that the possibility to impose similar requirements of cohabitation is not recognised by Directive 2004/38³³⁶.

The possibility left to Member States to impose prolonged periods of cohabitation allows the enforcement of an increasingly dated understanding of spousal relationships and household structures³³⁷. From such legal requirements a perverse normative effect emerges whereby immigrants joining resident spouses in the European space become mere commodities of the latter, and are denied with the possibility of developing life plans beyond those strictly related to the family realm. Just by way of example, it should be noted that an immigrant woman working as a domestic live-in worker, or simply working in a different city than her sponsor husband may risk losing her residence permit for her failure to satisfy that cohabitation requirement.

In sum, immigrant women within the scope of Directive 2003/86 appear to be disproportionately and negatively affected in their possibility to enjoy equal spousal relationship and equality within the family. Under this regime, the possibility for spouses to make independent choices concerning their place of work, their housing situation and their marital or relationship situation is severely curbed by the negative influence that such decisions may have on their residence permit and legal status in the host Member State.

³³⁶ On this aspect see Wiesbrock, A., *Legal Migration to the European Union*, cit., p. 481-482.

³³⁷ CATARINO, C., 'Politiques Migratoires et Politiques d'Emploi: La Flexibilité Sexuée en Europe', 51 (2) *Cahiers du Genre* (2011) 93, p. 102 [translation mine].

Against this background, a key question concerns whether the fundamental right to family life established by article 7 of the Charter, read in conjunction with the principles of equality and non-discrimination regardless of sex affirmed by this primary source, may prompt a judicial correction of the observed gendered shortcomings of European family migration law. At present time, the European Court of Justice has yet to tackle the issue of the compatibility of the described legally-enforced dependence with the fundamental right to family life established by the Charter. While the Court has previously analysed the imposition of cohabitation requirements in EU immigration law, it has done so merely through a literal interpretation of Regulation 1612/68 and subsequently of Directive 2004/38, without touching upon either Union citizens' or third-country nationals' fundamental rights and freedoms under EU law³³⁸.

However, cues for reflection are offered by the discussed case law of the Court on the functional extension to third-country national women of the fundamental rights and freedoms recognised to Union citizen children and spouses. The Court's characterisation of immigrant women's residence rights as merely functional to Union citizens' exercise of their own rights and freedoms, in particular, appears to further reinforce gender inequality within the family. In the case law at issue the Court embraced a rhetoric of spousal interdependence which casts serious doubts over the possibility of future interpretations of the fundamental rights framework of the Charter in the sense of correcting the gendered shortcomings of legally-enforced cohabitation allowed for by the discussed norms of EU law.

Although the dependence reinforced by the Court works both ways, the disparate impact of its case law on immigrant women specifically is apparent. On the one hand, by granting residence rights to third-country national women only in case their care work was indispensable for their Union citizen husbands' enjoyment of their own fundamental rights, the Court implicitly required a certain level of dependence of the former from the latter. This was particularly evident in the *Dereci* judgment. Here, the Court assessed that the involved Union citizens were not dependent on their third-country national spouses to such a degree that would have forced the former to leave the Union in case of denial of residence rights to their latter. Therefore, it concluded that the third-country nationals involved could not enjoy family life with their Union citizen spouses in the European territory. The inappropriateness of applying the same judicial standards used for the assessment of the degree of dependence

³³⁸ See Case 267/83, *Diatta*, judgment of 13 February 1985, ECR 567, Case C-413/99, *Baumbast and R.*, cit., esp. § 60 ff and – with specific reference to Directive 2004/38 – Case C-40/11, *Iida*, judgment of 8 November 2012, not yet published in ECR, esp. § 58 ff.

between parents and children to spousal relationship is quite evident. On the other hand, the dependence of the spouse performing unpaid care work on that performing productive work affirmed in the analysed case law appears much more serious. The dependence of the Union citizen spouse on the third-country national one constituted an implicit prerequisite used by the Court to assess the indispensable character of the unpaid care work performed by the latter for the former's enjoyment of his fundamental rights and freedoms. This second type of dependence, instead, constitutes an effect of the Court's judicial reasoning and of its granting residence rights to third-country national spouses exclusively to the extent that they perform unpaid work within the household and that such work allows others to access fundamental rights. By establishing childcare and housework as the gateway through which third-country national spouses may enjoy family life in the host country, the Court indirectly generates a dependence of carers upon the persons they care for. As a result, a reinforcement of the traditional gendered division of productive and reproductive work is created, whereby those performing unpaid care work (usually women) are encouraged to continue to do so in order to keep enjoying residence rights.

Therefore, it appears clearly that the real dependent subjects emerging from the Court's case law are once again third-country national immigrant women. In relation to cases such as *Baumbast* and *Zhu and Chen*, it has been rightly noted that "[while] an unpaid carer woman may be able to claim EU rights on the basis of her partner's status as an economic actor, the 'parasitic' nature of these family rights induces dependency within families and places carers in a vulnerable position"³³⁹.

In this light, the Court's capability to ensure immigrant women's enjoyment of equality within the family *vis-à-vis* the legally-enforced dependence envisaged by the current European family migration regime appears flimsy at the present time. The negative implications for immigrant women's equality within the family of the principles established by this case law were likely to have been unforeseen by the European Court of Justice. However, this unawareness is problematic in itself. The purely instrumental way of accessing

³³⁹ ASKOLA, H., 'Tale of Two Citizenships? Citizenship, Migration and Care in the European Union', 21(3) *Social and Legal Studies* (2012) 341, p. 345. See also ACKERS, L., 'Citizenship, Migration and the Valuation of Care in the European Union', 30(2) *Journal of Ethnic and Migration Studies* (2004) 373, p. 381. The author notes how "this conceptualization of the migrant family both presumes and reinforces relationships of dependency – between working and non-working spouses (...)". Although Ackers' analysis concerns Union citizens who migrate within the EU, her observations are applicable to the case of third-country national women and to the effects on this category of linking residence rights with their quality of spouses or parents of Union citizens.

fundamental rights for third-country national women established by the Court may constitute a further source of dependence on Union citizen husbands, because maintaining said rights will depend on their persistent adherence to gendered roles and on their “usefulness” or “desirability” within the household. Moreover, if being “useful” to someone else’s exercise of fundamental freedoms becomes the only or one of the few ways to access fundamental rights in Europe for third-country national immigrant women, the disparate impact on immigrant women of such a development appears to be self-evident due to the resulting increased commodification of family members in family reunification legal regimes.

3. European Law and Immigrant Women Workers’ Fundamental Rights

In this section, I will focus on a crucial aspect for immigrant women workers, i.e., access to employment in conditions of equality and non-discrimination. From the outset, it must be noted that the relevant sources of European law in this field form a complex legal framework. In addition to European migration law, the European anti-discrimination framework also plays an important role in determining the degree to which immigrant women are able to enjoy their fundamental rights as workers.

Thus, in this paragraph I will highlight the most relevant sources of European immigration law and European anti-discrimination law for immigrant women’s access to employment in conditions of equality and non-discrimination. By doing so, I aim to provide a normative background for the gendered analysis that will be carried out in sub-sections a) and b). In particular, in subsection a) I will discuss the main shortcomings of these sources from the specific point of view of immigrant women workers. In subsection b), given the discussed limitations of the fundamental right to engage in work recognised by art. 15 of the Charter, I will explore the extent to which the EU anti-discrimination framework has so far responded to the complex experiences of disadvantage of immigrant women workers in the European legal space, drawing future perspectives for further advancement in this area. In my analysis, I will touch upon two main issues, i.e., the interaction between the right to non-discrimination and biased immigration policies at the national level, and the application of said right in private employment relationships.

From the outset, it must be noted that immigrant women’s access to employment is regulated by both EU family migration law and by EU labour migration law. Both of these regimes dictate rules for third-country nationals’ access to the labour market – respectively applicable

to family members entering the Union for family reunification purposes and to third-country nationals migrating to Europe for work reasons. In addition to these two regimes, this section will also critically analyse key provisions for immigrant women workers established by the EU anti-discrimination regime.

As to European family migration law, while Directive 2004/38 does not envisage any limitation to the spouse's right to work after being admitted to the Union territory for the purpose of family reunification, Directive 2003/86 appears much more restrictive. On the one hand, article 23 of Directive 2004/38 grants an unconditional right to work to family members of Union citizens within its scope, establishing that "[irrespective] of nationality, the family members of a Union citizen who have the right of residence or the right of permanent residence in a Member State shall be entitled to take up employment or self-employment there". Therefore, regardless of the length covered by their right of residence and of their nationality, third-country national immigrant women married or in a registered partnership with a Union citizen are granted by the Directive with the right to access employment or self-employment. Article 14(2) of Directive 2003/86, on the other hand, leaves Member States free to determine the conditions under which family members can exercise employed or self-employed activities. Furthermore, this provision also allows Member States to prevent family members (and thus spouses) from performing said activities for the first year of their stay according to "the situation of their labour market".

Moving on to the European labour migration regime, art. 12 of Directive 2009/50 grants Blue Card holders with a right to access Member States' labour markets. Several limitations are however established with respect to this right to work. Indeed, for the first two years of residence, access to the labour market is exclusively recognised in relation to highly-skilled employment, and Blue Card holders are prevented by article 12(2) from changing employers without "the prior authorisation in writing of the competent authorities of the Member State of residence". Moreover, after two years of legal employment, article 12(1) leaves the right to access the national labour market in conditions of equality with nationals to the host Member State's discretionary power. In case the host Member State denies such a right, article 12(2) also establishes an obligation for Blue Card holders to communicate any changes affecting the initial conditions of their admission to the national authorities. Other allowed restrictions concern access to employment entailing the exercise of public authority – *ex* article 12(3) – as well as to certain "activities reserved to nationals" - *ex* art. 12(4).

Directive 2011/98, on its part, applies to third-country nationals seeking to reside and work in a Member State, to those already admitted to a Member State for purposes other than work but who are authorised to work and hold a residence permit, and those who have been admitted to a Member State for the purpose of work (art. 3). Its art. 11(c) specifies that holders of the single residence and work permit must be authorised to “exercise the specific employment activity authorised under the (...) permit in accordance with national law”. The adopted formulation suggests that Member States shall grant single work and residence permits tied to a specific type of employment, and that in order to change employment third-country nationals may be required to ask for an amendment of such permits before the national authorities.

In addition to these sources of family and labour migration law, article 14 of Directive 2003/109 grants third-country nationals holding a long-term residence permit with a right to move and reside in other Member States in order to exercise an employed or self-employed activity. Art. 14(3), however, establishes the possibility for Member States to limit this right by examining “the situation of their labour market and [applying] their national procedures regarding the requirement for (...) filling a vacancy, or for exercising [self-employed] activities”, and also by giving preference to Union citizens or to already resident and unemployed third-country nationals “for reasons of labour market policy”. Moreover, art. 14(4) appears to allow Member States to maintain national quotas for the entry of third-country national workers, by establishing that “Member States may limit the total number of persons entitled to be granted right of residence, provided that such limitations are already set out for the admission of third-country nationals in the existing legislation at the time of the adoption of this Directive”.

One common thread in the examined legal sources of European labour migration law is constituted by their recognition to third-country national workers of a right to equal treatment with citizen workers. In fact, the vast majority of the rights granted by these sources are not established in absolute terms, but rather as a right to equal treatment with the host Member State’s nationals in a variety of domains. For instance, the Blue Card Directive at art. 14 provides third-country national workers admitted under its regime with a right to equal treatment in the field of employment³⁴⁰. A similar right is also recognised by art. 12 of the

³⁴⁰ More specifically, article 14 of Directive 2009/50 grants such fundamental right to equal treatment as regards “working conditions, including pay and dismissal, as well as health and safety requirements at the workplace” (let. a), freedom of association, affiliation and membership of trade unions (let. b), education and

Single Permit Directive³⁴¹, although exclusively to third-country nationals already admitted in a Member State, leaving out those applying to reside in a Member State for the purpose of work. Interestingly, a right to equal treatment with Member States' citizens in the field of employment is also established beyond EU labour migration law by art. 11 of Directive 2003/109 (also with specific reference to access to employment) for long-term residents³⁴², and implicitly for third-country national family members of Union citizens exercising freedom of movement within the Union by article 24 of Directive 2004/38³⁴³.

Beyond European immigration law, the principle of equality and non-discrimination in the field of employment has been affirmed on a broader level by the European anti-discrimination legal framework – including Directive 2000/43 (the so-called Race Discrimination Directive), Directive 2000/78 (or Employment Equality Framework Directive) and Directive 2006/54 (the so-called Recast Directive or Sex Equality Directive). The European anti-discrimination regime covers both direct and indirect discrimination. Direct discrimination occurs when one

vocational training (let. c) as well as “recognition of diplomas, certificates and other professional qualifications in accordance with the relevant national procedures” (let. d), social security (let. e), “payment of income-related acquired statutory pensions in respect of old age, at the rate applied by virtue of the law of the debtor Member State(s) when moving to a third country” (let. f), “access to goods and services (...) including procedures for obtaining housing, as well as information and counselling services afforded by employment offices” (let. g) and finally “free access to the entire territory of the Member State concerned, within the limits provided for by national law” (let. h).

³⁴¹ Art. 12 of Directive 2011/98, in particular, envisages a fundamental right to equal treatment with nationals with respect to working conditions, “including pay and dismissal as well as health and safety at the workplace (let. a), freedom of association (let. b), education and vocational training (let. c), “recognition of diplomas, certificates and other professional qualifications” (let. d), social security (let. e), tax benefits (let. f), access to goods and services as well as “the supply of goods and services made available to the public including procedures for obtaining housing as provided by national law” (let. g), and “advice services afforded by employment offices” (let. h).

Art. 12(2), however, provides for several relevant limitations to such fundamental right to equal treatment. Firstly, Member States are allowed to restrict the right to education and vocational training “to those third-country workers who are in employment or who have been employed and who are registered as unemployed” – ex art. 12(2)(a)(III) – as well as to impose “specific prerequisites including language proficiency and the payment of tuition fees” with respect to higher education and vocational training “not directly linked to the specific employment activity” – ex art. 12(2)(a)(IV). Furthermore, pursuant art. 12(2)(b) the fundamental right to equal treatment with respect to social security can be limited by Member States, but only for those third-country nationals workers who are neither employed nor have been employed for a minimum of six months. A specification of this possibility is provided in the same provision with respect to family benefits, the access to which may be reserved by Member States, among other hypotheses, to those third-country nationals who have been authorised to work in their territory for more than six months. Similarly, ex art. 12(2)(c) Member States may limit the right to equal treatment with respect to tax benefits to cases where the family member for which such benefits are claimed resides on their territory. Lastly, art. 12(2)(d) authorises Member States to restrict access to housing and to exclusively grant a right to equal treatment in the access to goods and service to third-country nationals who are in employment.

³⁴² See art. 11(1)(a) of the Directive.

³⁴³ Art. 24(1) of Directive 2004/38 extends to family members of Union citizens exercising freedom of movement within the Union the right to “equal treatment with nationals of the [host] Member State within the scope of the Treaty”, provided that these family members have a right of residence or permanent residence.

person is treated less favourably than another is, has been, or would be treated in a comparable situation³⁴⁴. Indirect discrimination, on the other hand, takes place where an apparently neutral provision, criterion or practice would put persons of a certain group at a particular disadvantage compared with other persons, unless the differential treatment is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary³⁴⁵. Harassment is also prohibited by this legal framework as a form of discrimination when an unwanted conduct related to certain characteristics such as race, ethnic origin, sex, and so forth takes place “with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment”³⁴⁶.

In relation to access to employment, these legal sources prohibit discrimination on several grounds. Article 3(1)(a) of the Directive 2000/43 prohibits race or ethnic discrimination in relation to access to employment “including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”. An identical provision is enshrined in article 3(1) of Directive 2000/78 in relation to discrimination on the grounds covered by the Directive, i.e., religion or belief, disability, age or sexual orientation. Even more importantly, Recital 5 of the Preamble of Directive 2006/54 explicitly recalls articles 21 and 23 of the European Charter, respectively prohibiting discrimination on several grounds – including sex – and establishing a fundamental right to equality regardless of sex “in all areas, including employment, work and pay”. Furthermore, article 14(1)(a) of the Directive prohibits “direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, in relation to (...) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion”.

Interestingly, the anti-discrimination legal framework also includes specific provisions designed to support access to justice and redress for victims of discrimination. For instance, all of the mentioned sources envisage an obligation for Member States to set up judicial or administrative procedures for the enforcement of the Directive. These procedures must be available to all individuals claiming to be victims of race discrimination³⁴⁷. Another key obligation for Member States relates to ensuring the participation of interested associations or

³⁴⁴ See article 2 of Directive 2000/43, article 2 of Directive 2000/78 and article 2 of Directive 2006/54.

³⁴⁵ *Id.*

³⁴⁶ See article 2(3) of Directive 2000/43, article 2(3) of Directive 2000/78 and article 2(1)(c) of Directive 2006/54.

³⁴⁷ See article 7 of Directive 2000/43, article 9 of Directive 2000/78 and article 17 of Directive 2006/54.

organisations in said procedures, provided that they have a legitimate interest in enforcing the Directive and that the complainant approves³⁴⁸. Lastly, this framework importantly establishes a reversal of the burden of proof, which will weigh on the respondent in case the alleged victims of race discrimination are able to submit “facts from which it may be presumed that there has been direct or indirect discrimination”,³⁴⁹.

a. A Gendered Assessment of Key European Union Law Provisions in the Light of Immigrant Women’s Fundamental Right to Engage in Work

Assessing the capability of the described legal framework to effectively support immigrant women’s access to employment in conditions of equality and non-discrimination appears particularly important in relation to immigrant women’s equality within the family. Indeed, being able to contribute to the household income through productive work, and most importantly the enjoyment of a certain level of economic independence, can foster more equal relationships between immigrant women and their husbands or partners. With that in mind, I will now examine more closely the specific shortcomings of this system from the perspective of immigrant women’s right to engage in work as also envisaged by article 15 of the Charter.

As I have shown, the European family migration regime reveals a strongly differentiated protection of immigrant women’s right to engage in work depending on the nationality of their sponsoring family members – with Directive 2004/38 establishing much stronger guarantees in comparison to Directive 2003/86. In this light, the limitations to access the labour market allowed for by Directive 2003/86 are at high risk of generating perverse effects on third-country national family migrants, forcing them into the role of mere commodities of the sponsor, rather than recognising their quality of individuals with their own life plans and aspirations beyond the family realm³⁵⁰. The disparate impact on immigrant women of these limitations, therefore, further reinforces the effects of both Directives’ imposition of income requirements for the purpose of family reunification exclusively to the sponsor³⁵¹, discussed in relation to immigrant women’s right to family life. Arguably, the exclusive focus on the capability of the sponsor to support the entire family and the discussed limitations to family

³⁴⁸ *Id.*

³⁴⁹ See article 8 of Directive 2000/43, article 10 of Directive 2000/78 and article 19 of Directive 2006/54.

³⁵⁰ Kofman, E., Roosblad J., Keuzenkamp, S., ‘Migrant and Minority Women’, cit., p. 63. See also Eurostat, *Migrants in Europe*, cit., p. 84.

³⁵¹ Strasser, E., Kraler, A., Bonjour, S., Bilger, V., ‘Doing Family’, cit., p. 170.

members' access to the host country's labour market reveal the adoption of a one breadwinner model which further reinforces the commodification of reunited family members – and thus at present time of third-country national immigrant women. Indeed, a lack of consideration of family members' (and spouses' in particular) capabilities to contribute to their own support makes them passive followers of the sponsor, confined to the private realm of reproductive work and not primarily interested in productive work. As a consequence of these legislative choices, “the right to family (re)unification is primarily construed as a right to reproduction”³⁵².

The only positive legal provisions in this respect seem to be provided by Directive 2003/109 and Directive 2003/86. The first source envisages the possibility for the Member State in which the long-term residents exercise their freedom of movement to consider not only their own resources for the purpose of authorising family members to accompany or join them in their territory, but also the family members' own possibilities of supporting themselves. Article 16(1)(a) of Directive 2003/86 establishes that if at time of renewal of the residence permit for family reunification the sponsor no longer satisfies the income requirements ex art. 7(1)(c), “the Member State shall take into account the contributions of the family members to the household income”. By doing so, these provisions implicitly recognise that spouses too can contribute to their own maintenance and to the support of their families through productive, not only reproductive, work – a contribution that, in the case of art. 16 of Directive 2003/86, Member States are *obliged* to consider where the sponsor no longer satisfies income requirements by himself or herself.

Another crucial aspect to consider in this context concerns the possibility to sponsor family reunification of ascendants which – considering immigrant women's disproportionate difficulties in reconciling work and family life due to the absence of kin networks³⁵³ – is an important factor in enabling them to access the host country's labour market. In this area, article 4(2)(a) of Directive 2003/86 merely allows Member States to authorise reunification of “first-degree relatives in the direct ascending line of the sponsor or his or her spouse”, without establishing any obligation in this sense, and only “where they are dependent on [the sponsor or his or her spouse] and do not enjoy proper family support in the country of origin”. As a result, Directive 2003/86 appears somewhat limited in that it only allows for the reunification of ascendants when they would constitute an additional care burden rather than an active contribution to the family management.

³⁵² *Id.*

³⁵³ *Ibid.*, p. 172.

Moving on to European labour migration law, it must be noted that the most obvious gendered shortcoming of this legal framework with respect to immigrant women's fundamental right to work (and thus to access employment) has been eliminated by Directive 2011/98. Before its adoption, the European legal framework on labour migration mostly appeared to be designed to accommodate labour market demands, attracting "desirable" third-country nationals by regulating access to the European Union for the purpose of pursuing specific professions. Legal scholars thus pointed out how the "economic attractiveness" of third-country national migrants was among the actors shaping "a hierarchy of legal residents within the EU"³⁵⁴.

While legitimate, this type of approach was quite problematic from a gendered point of view. Due to the abovementioned disproportionate difficulties experienced by immigrant women to enter the Union for labour purposes under highly skilled or temporary work schemes, it appeared that the "economically attractive" third-country national worker was clearly male. As a result, immigrant women experienced disproportionate difficulties in obtaining work permits and thus legal access to the European labour market³⁵⁵. What is more, the fact that basically all legal sources on labour migration linked access to the fundamental right to work with minimum income requirements constituted a further source of indirect discrimination for immigrant women. On a broader level, it has rightly been observed that such an emphasis on income requirements generated a process whereby, while Union citizenship is increasingly becoming a source of fundamental rights and is moving away from a market citizenship model, this model is being brought back for third-country nationals³⁵⁶. Arguably, immigrant women are particularly disadvantaged by this phenomenon, considering their lower rates of participation in the host country's labour market as well as the stark pay gap experienced by this category³⁵⁷. As a result, "[the] same factors that make TCN migrant women the obvious 'solution' to the care crisis now – they are cheap and flexible, prepared to work irregular hours with low pay, especially if they are in a precarious legal situation – make it unlikely that they would get Council sanctions as 'TCN market citizens'"³⁵⁸.

³⁵⁴ Morano-Foadi, S., Andreadakis, S., 'The Convergence of the European Legal System', cit., p. 1076.

³⁵⁵ In this respect see ASKOLA, H., "Illegal Migrants", Gender and Vulnerability: The Case of the EU's Returns Directive', 18 *Feminist Legal Studies* (2010) 159, p. 166.

³⁵⁶ BELL, M., 'Civic Citizenship and Migrant Integration', 13 (2) *European Public Law* (2007) 311, especially pp. 328-329

³⁵⁷ *Ibid.*, p. 329.

³⁵⁸ Askola, H., 'Tale of Two Citizenships?', cit., p. 351.

The adoption of Directive 2011/98 clearly changed the described focus on specific, male-dominated professions that characterised the European legal framework on labour migration up to that point. The possibility for third-country nationals to emigrate to the Union territory for the purpose of performing any type of employment – at least from a legal point of view – is certainly a significant development for immigrant women workers. Notwithstanding this important development, specific problems persist for immigrant women's access to employment. For instance, the adherence by the Blue Card Directive to purely economic thresholds, used to qualify a worker as highly skilled, still specifically curbs women's possibilities to access the European labour market under this label³⁵⁹. In this respect, it had been rightly observed that a stronger gender sensitivity of the Directive's provisions may have been reached through the inclusion of human capital elements such as education among the factors of assessment of the highly skilled quality of workers³⁶⁰. This normative choice would permit the inclusion of severely undervalued professions where immigrant women disproportionately concentrate under the definition of highly skilled employment on which the Directive rests. For instance, by considering the high social and economic value of professional childcare or elderly care, it would have been possible to include immigrant domestic workers within its scope. By doing so, not only might domestic workers have been able to access key rights in the field of employment, but the more favourable norms of the Directive would have been applicable to a sector of the labour market characterised by particularly low legal protections.

Moving on to the European anti-discrimination regime, it must be noted that access to employment in conditions of non-discrimination is disproportionately important for immigrant women due to the numerous grounds of discrimination on which such access may be prevented. Just like national women workers, immigrant women may suffer from sex discrimination in their efforts to access the host country's labour market. But as immigrant workers, immigrant women are also exposed to discriminatory treatment in the field of employment on the grounds of ethnic origin, race, nationality, migrant status, and so on. These grounds, moreover, may also combine and generate multiple or intersectional

³⁵⁹ KOFMAN, E., RAGHURAM, P., 'Skilled Female Migrants in the Discourse of Labour Migration in Europe', in *Mobility & Inclusion: Managing Labour Migration in Europe*, Dossier, Heinrich BöllStiftung, April 2010, available at http://www.migration-boell.de/downloads/migration/DOSSIER_Mobility_and_Inclusion.pdf [last accessed 4 February 2013], p. 57. For similar observations in relation to the Highly Skilled Migrant Programme in the UK, see also Kofman, E., Roosblad, J., and Keuzenkamp, S., 'Migrant and Minority Women', cit., p. 62.

³⁶⁰ Kofman, E., Raghuram, P., 'Skilled Female Migrants', cit., p. 57.

discrimination against immigrant women workers³⁶¹. In the light of immigrant women's fundamental right to engage in work as enshrined under article 15(1) of the Charter in conjunction with the principles of equality and non-discrimination established therein, the EU anti-discrimination regime presents crucial shortcomings.

Firstly, this regime focuses on single-ground discrimination rather than tackling multiple discriminations. While both Directive 2000/43 and Directive 2000/78 show awareness of the problem³⁶², it has been rightly noted that “the term ‘multiple discrimination’ does not appear anywhere else in either of these Directives and no definition is given nor any indication as to how to deal with cases of multiple discrimination”³⁶³. Moreover, the obligation of Member States’ to report on the gendered impact of the Directives’ provisions has not been fully implemented³⁶⁴.

Secondly, while Directive 2006/54 importantly covers equal treatment between men and women in the field of employment, Directive 2000/78 tackles discrimination grounds which are not – with the important exception of religion or belief – among those most commonly experienced by immigrant women workers. A recent survey conducted in Europe among ethnic minorities and immigrant groups has indeed shown that the most common grounds of discrimination reported by immigrant women are immigrant origin, religion or belief and gender³⁶⁵. On the other hand, discrimination on grounds of disability, age and sexual orientation – while extremely serious and deserving of legislative attention – are statistically far less relevant for immigrant women. Thus, the most important aspect covered by the

³⁶¹ Kofman, E., Roosblad J., Keuzenkamp, S., ‘Migrant and Minority Women’, cit., p. 48. See also Rubin, J., Rendall, M. J., Rabinovich, L., Tsang, F., van Oranje-Nassau, C., Janta, B., *Migrant Women in the European Labour Force*, cit., p. 44.

³⁶² Indeed, in Recitals 14 and 3 respectively, these Directives’ Preambles specifically point to the fact that “women are often the victims of multiple discrimination” and invite the Community to implement the principles enshrined in their provision while also promoting equality between men and women. Moreover, article 17 of the Race Equality Directive and article 19 of the Employment Framework Directive require Member States – “in accordance with the principle of gender mainstreaming” - to provide in their mandatory reports on the Directives’ implementation “an assessment of the impact of the measures taken on women and men”.

³⁶³ CARLES, I., HOWARD, E., KOFMAN, E., ‘Gendered Experiences of Racial Discrimination: Comparative Socio-Legal Research’, in Schiek, D., Lawson, A. (eds.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, Fernham, Surrey, United Kingdom, 2011, pp. 236-237.

³⁶⁴ SCHIEK, D., MULDER, J., ‘Intersectionality in EU Law: A Critical Re-Appraisal’, in Schiek, D., Lawson, A. (eds.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, Fernham, Surrey, United Kingdom, 2011, p. 259.

³⁶⁵ European Union Agency for Fundamental Rights (FRA), *European Union Minorities and Discrimination Survey - Data in Focus Report 5: Multiple Discrimination*, 2011, p. 13. In particular, 93% of female respondents indicated that immigrant origin was one of the grounds on which they had experienced multiple discrimination, while 56% of women reported religion or belief and 44% cited gender. It is worth highlighting that only 24% of male respondents reported gender as a grounds for their experience of multiple discrimination.

Directive for our purposes is constituted by discrimination at the workplace on the grounds of religion or belief.

Thirdly, and most importantly, the European anti-discrimination regime does not cover nationality discrimination. Article 3(2) of the Race Discrimination Directive and article 3(2) of the Employment Equality Framework Directive explicitly exclude differential treatment on the grounds of nationality from their scope of application. In particular, these Directives are without prejudice of all provisions “relating to the entry into and residence of third-country nationals” in Member States as well as “any treatment which arises from the legal status of the third-country nationals (...) concerned”. It is worth recalling that while discrimination on grounds of nationality is, as interestingly noted elsewhere, “the most important prohibited discrimination ground in EU law generally”³⁶⁶, such a ground has been consistently excluded from relevant sources of EU discrimination law applicable to third-country nationals³⁶⁷. For immigrant women specifically, nationality is one of the grounds of discrimination that—either alone or combined with sex, race, and migrant status – significantly contributes to the difficulties experienced by this category in accessing their host countries’ labour market. In this matter, however, article 15 of the Charter may not constitute an effective ground to correct the observed shortcoming. As stressed above, article 15 merely establishes third-country nationals’ right to equivalent working conditions with those of Union citizens, implicitly admitting the possibility of differential treatment on the grounds of nationality as to the right to engage in work established by its paragraph 1.

In this paragraph, I have highlighted the main gendered shortcomings of two main legal frameworks applicable to immigrant women workers, i.e., EU immigration law (including EU labour migration law as well as specific norms of EU family migration law concerning access to employment) and the EU anti-discrimination regime. At this point, considering the lack of availability of judgments by the European Court of Justice discussing the observed shortcomings in the light of the fundamental right to engage in work enshrined by the Charter,

³⁶⁶ NIELSEN, R., ‘Is European Union Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet? Precautions Against Neglecting Intersectional Cases’, in Schiek, D., Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, 2009, p. 33.

³⁶⁷ The exclusion of nationality as a prohibited ground of discrimination against third-country national workers in EU law has been effectively criticised by BALL as contrary to legal rationality (BALL, R., *The Legitimacy of the European Union Trough Legal Rationality: Free Movement of Third Country Nationals*, Routledge, London, 2014, pp. 235 – 238). More broadly speaking, the author also observes how linking fundamental rights protection and Union citizenship constitutes a limitation of fundamental rights that “appears to undermine the essential element of the protection of human rights that they are applicable to all on the basis of innate humanity” (*ibid*, p. 237).

I will now proceed to enquire into the Court's interpretation of the European anti-discrimination framework to cases of specific relevance for immigrant women workers' access to employment in conditions of equality and non-discrimination.

b. Access to Employment in Conditions of Non-Discrimination Before the European Court of Justice: Some Reflections on Selected Judgments

As a preliminary observation, it must be noted that the European Court of Justice's case law on the specific issue of employment discrimination as a breach of the right to work enshrined in article 15(1) of the Charter is still under construction³⁶⁸. What is more, the Court's judgments so far have focused on a marginal ground of discrimination for immigrant women workers in the European legal space, i.e., age discrimination. It is certainly noteworthy that in these judgments the Court specifically established that the prohibition of discrimination (in the contingent case on the grounds of age) envisaged by Directive 2000/78 "must be read in the light of the right to engage in work recognised in Article 15(1) of the Charter of Fundamental Rights of the European Union"³⁶⁹.

With that in mind, I will now turn to discuss judicial examples provided by the European Court of Justice that in my view offer interesting insights about the capability of the EU anti-discrimination framework to effectively capture and correct the complex experiences of discrimination of immigrant women workers, and its shortcomings in this area. The *Jany* case³⁷⁰ offers a telling illustration of how examining national immigration policies through the lens of the right to equal treatment may expose their gender bias. The judgments of *Firma Feryn* and *Meister* constitute interesting judicial examples of the horizontal effects of the fundamental right to equality and non-discrimination (the latter with specific reference to immigrant women workers). Thus, in this section I will critically analyse these judgments, highlighting their specific significance for immigrant women workers.

The *Jany* judgment concerned Polish and Czech women (still third-country nationals at the time) who had been denied by the Dutch authorities residence permits for the purpose of

³⁶⁸ Among the few judgments pronounced by the Court to date, it is possible to cite Case C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, judgment of 5 July 2012, not yet published in ECR, and joined Cases C-159/10 and C-160/10, *Gerhard Fuchs and Peter Köhler v. Land Hessen*, judgment of 21 July 2011, ECR I-06919.

³⁶⁹ *Torsten Hörnfeldt v. Posten Meddelande AB*, cit., § 37, and *Gerhard Fuchs and Peter Köhler v. Land Hessen*, cit., § 62.

³⁷⁰ Case C- 268/99, *Jany and Others*, judgment of 20 November 2001, ECR I-8615.

working as self-employed sex workers in the Netherlands. The applicants were covered by Association Agreements between their states of origin and the European Community, which extended the fundamental freedom of establishment for the purpose of pursuing a self-employed activity enjoyed by citizens of Member States to Polish and Czech nationals respectively³⁷¹. However, the national authorities rejected their application on the grounds that “prostitution [was] a prohibited activity or at least not a socially acceptable form of work and [could not] be regarded as being either a regular job or a profession”³⁷². Consequently, the European Court of Justice was asked by the national court to determine – among other questions – whether prostitution could be excluded from self-employed activities covered by the scope of the Association Agreements. In this context, the referring court submitted the illegal nature of prostitution and referred to “reasons of public morality” as well as to the fact that it would have been “difficult to control whether persons pursuing that activity are able to act freely and are therefore not, in reality, parties to disguised employment relationships”³⁷³.

Among the various aspects touched upon by the Court, two points are particularly significant. Both concern the justifications submitted by the national authorities in support of their interpretation of association agreements, which resulted in a limitation of the applicant women’s freedom of establishment and thus of their access to the national labour market. This analysis, in my view, offers an important example of fruitful interaction between fundamental rights and freedoms on the one hand and restrictive interpretations of legal norms on the other. Indeed it was precisely this interaction that indirectly exposed and trumped a discriminatory treatment in the field of access to employment. As for the justification based on the alleged immorality of the activity pursued by the immigrant women involved, the Court rightly observed that Member States could legitimately limit freedom of establishment for reasons of public policy and it was not for Community law to impose moral standards and common values as to what infringes public policy. However, the Court also established that the national authorities could not restrict foreigners’ right to enter, reside and work on their territory on grounds of public policy where they “[do] not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct”³⁷⁴. Consequently, since prostitution was

³⁷¹ Association Agreement between the Communities and Poland (signed in Brussels on 16 December 1991, entered into force on 1 February 1994), and Association Agreement between the Communities and the Czech Republic (signed in Luxembourg on 4 October 1993 and entered into force on 1 February 1995).

³⁷² *Ibid.*, § 18.

³⁷³ *Jany and Others*, cit., § 51.

³⁷⁴ *Ibid.*, § 60. It must be noted that reasons of public policy are still considered by European immigration law as a legitimate justification for the rejection of applications for residence permits or for restricting third-country

considered a legal activity in the Netherlands for citizens, the immigrant women involved had to be admitted to the national territory in order to pursue the same activity. Moreover, the Court also discussed the referring court's argumentation whereby a risk of abuse of freedom of establishment by Polish and Czech nationals subsisted because of the difficulty in ascertaining that foreign prostitutes were actually pursuing a self-employed activity rather than dependent employment from a pimp. Interestingly, the Court contrasted similar stereotypical assumptions by observing, among other facts, that the Dutch authorities "had not (...) provided support for the presumption that a person engaged in prostitution whose personal and working freedom is restricted by her pimp – a situation which is covered, where appropriate, by the criminal law of the host Member State – is to be treated as a person in an employment relationship"³⁷⁵. In any case, the difficulty to carry out checks in this area could not justify the assumption whereby "all activity of that kind implies that the person concerned is in a disguised employment relationship and consequently to reject an application for establishment solely on the ground that the planned activity is generally exercised in an employed capacity"³⁷⁶. Such an approach, in the Court's view, "would put an economic activity entirely beyond the freedom of establishment arrangements introduced by the Association Agreements"³⁷⁷ at issue.

In sum, the described analysis of the Court of national immigration policies in the light of the fundamental freedom to establishment for the purpose of work supported the involved immigrant women's access to self-employed activities in conditions of equality and non-discrimination with Dutch workers. From a gendered point of view, two main points can be raised. Firstly, I would argue that while this was not the focus of the Court in the *Jany* case, the analysis of the national authorities' decision in the light of the fundamental right to equal treatment regardless of nationality revealed the gender bias implied in the refusal of a residence permit to the involved third-country national women. Even more notably, the heavily gendered subtexts underlying the national authorities' justification for such a rejection were effectively trumped by the Court of Justice. Secondly, the *Jany* judgment suggests the difficulty of isolating one ground of discrimination from others, especially when immigrant women are involved. In this case, indeed, it appears that while the most visible issue concerned nationality-based discrimination, the grounds of sex were also very much present

nationals' access to host countries' labour markets. See for instance art. 5(1)(f) of Directive 2008/50, articles 6 and 17 of Directive 2003/109, and articles 1(c), 7 and 23 of Directive 2004/38.

³⁷⁵ *Ibid.*, § 68.

³⁷⁶ *Ibid.*, § 67.

³⁷⁷ *Ibid.*, § 69

in the national authorities' justifications for their restrictive attitudes. This is especially noticeable in the referring court's references to public morality as a possible reason to deny prostitution the status of self-employed activity. Furthermore, the fact that prostitution was indeed a legal activity in the Netherlands suggests the presence of migrant status as an implied component of the nationality discrimination identified by the Court of Justice.

Moving on to the *Firma Feryn*³⁷⁸ and *Meister*³⁷⁹ judgments, in these cases the Court of Justice analysed the horizontal effects of the European anti-discrimination regime, providing important clarifications in this field. For our purposes, the application of the fundamental right to equal treatment and non-discrimination in employment relationships between private individuals is a particularly interesting matter. On a broader level, it must be stressed that many of the observed difficulties disproportionately affecting immigrant women workers in the European legal space generate vulnerability and power imbalances in their relationships with employers³⁸⁰. Therefore, the enforcement of their rights in horizontal relationships and not merely in immigrant workers' relations with the host State is in general particularly important for immigrant women. With specific respect to the right to non-discrimination, it can be observed that the labour market segregation experienced by immigrant women in Europe demands a special attention to their effective enjoyment of said right. Their disproportionate concentration in certain sectors of the European labour market, indeed, often fosters a depersonalization of immigrant women workers caused by the identification of this group with their profession on the grounds of sex, migrant status, ethnicity, and nationality³⁸¹. Arguably, such an identification is extremely problematic in that it may constitute both the source and the consequence of multiple and intersectional discrimination. In the light of these

³⁷⁸ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, judgment of 10 July 2008, ECR I-5187.

³⁷⁹ Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, judgment of 19 April 2012, not yet published in ECR.

³⁸⁰ Kofman, E., Roosblad, J., Keuzenkamp, S., 'Migrant and Minority Women', cit., p. 54. See also Eurostat, *Migrants in Europe*, cit., p. 58.

³⁸¹ This issue is particularly visible with respect to domestic work. In this highly feminized sector (International Labour Organization, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*, International Labour Office, Geneva, Switzerland, 2013, see in particular p. 35 ff.), several factors contribute to disempower immigrant women employed as domestic workers and to tip the balance of the employment relationship in favour of employers. Such factors generate extremely complex power relationships with employers, which are deeply and inextricably entrenched in race, ethnicity, class, and culture in addition to sex. In the introduction to this thesis, I emphasised two main issues that significantly foster this phenomenon (Miranda, A., *et al.*, 'Les Mobilisations des Migrantes', cit., p. 8 ff; Miranda, A., 'Une Frontière Dans l'Intimité', cit., §2; Miranda, A., *Migrare al Femminile*, cit., pp. 106 and 120; Kindler, M., 'The relationship to the Employer', cit., §15 ff; Lutz, H., 'When Home Becomes a Workplace', cit., p. 8; Ozyegin, G., Hondagneu-Sotelo, P., 'Conclusion: Domestic Work', cit., p. 199-200).

observations, I will now turn to the *Firma Feryn* and *Meister* judgments in order to examine critically the principles established by the Court of Justice on the important matter of discrimination in relation to access to employment of immigrants in general and immigrant women in particular.

In the case of *Firma Feryn*, the Belgian Centre for Equal Opportunities and Combating Racism argued that one of the directors of a company selling and installing doors had applied a discriminatory recruitment policy. In particular, the Centre highlighted that the director had publicly declared that he would not employ “immigrants” in his company “because its customers were reluctant to give them access to their private residences for the period of the works”³⁸². The Labour Court of Brussels – to which the Centre had appealed after its application had been dismissed on the grounds that there was no proof that an actual person had applied and been rejected for a job due to ethnic origin – referred the issue to the ECJ. In relation to the scope of Directive 2000/43, the Court of Justice held that “the fact that an employer declares publicly that it will not recruit employees of a certain ethnic or racial origin, something which is clearly likely to strongly dissuade certain candidates from submitting their candidature and, accordingly, to hinder their access to the labour market, constitutes direct discrimination in respect of recruitment within the meaning of Directive 2000/43”³⁸³ – regardless of the presence of a specific complainant claiming to be the victim of a similar discrimination.

The most interesting point of this case concerns the fact that, as emerged from the Opinion of Advocate General Maduro, the director of the company had originally declared that he would not employ “Moroccans” rather than immigrants³⁸⁴. The lack of clarity as to whether the employer was actually against the employment of persons of immigrant origin, of a certain ethnic group or of a certain nationality did not however prevent the Court from identifying a form of discrimination prohibited by the Race Discrimination Directive. In this respect, it has been importantly argued that in the *Firma Feryn* case the European Court of Justice established the presence of direct race discrimination thanks to its implicit recognition of the links between national origin and ethnic origin³⁸⁵. In fact, similarly to what I observed

³⁸² *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, cit., § 16.

³⁸³ *Ibid.*, § 25.

³⁸⁴ Case C- 54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn*, Opinion of Advocate General Poiares Maduro, delivered on 12 March 2008, §3.

³⁸⁵ LINOS, K., ‘Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union’, 35 *Yale Journal of International Law* (2010) 115, p. 156 ff. See also GRIGOLO, M., HERMANIN, C., MÖSCHEL, M., ‘Introduction: How Does Race ‘Count’ in Fighting Discrimination in Europe?’, 34(10) *Ethnic and Racial*

with respect to the *Jany* judgment, it appears that this case presented a more complex situation of discrimination than that simply based on ethnic origin. Indeed, the employer's discriminatory attitude was implicitly based not simply on ethnic origin but also on migrant status and possibly on sex³⁸⁶. Against this background, I would argue that the Court's qualification of the employer's declarations against "immigrants" and "Moroccans" as a form of race discrimination is particularly significant. In this case, discrimination on the grounds of nationality was also quite evident. The Court, however, chose to overlook the problem of the distinction between these two grounds and identified the presence of discrimination on the grounds of race and ethnic origin. In my view, by doing so the Court offered an important ground to counter the problematic effects of the commented exclusion of nationality from the EU anti-discrimination regime and from the scope of the right to engage in work pursuant art. 15(1) of the Charter. By unveiling that a differential treatment on the grounds of nationality may be strictly linked to a prohibited discrimination on the grounds of race or ethnic origin, the principles established in the judgment at issue may support a broadening of the scope of the right to employment to include situations of "hidden" nationality discrimination³⁸⁷.

In the *Meister* judgment issues of multiple discrimination were also raised by the applicant – a third-country national woman pursuing employment in Germany. In this case, the Court was presented with the case of a Russian national (Ms Meister) holding a degree in systems engineering who had repeatedly applied for a post advertised by the company Speech Design and had always been rejected without explanation. Ms Meister held before the German Labour Court that her level of expertise matched that referred to by the job advertisement, and "considered that she suffered less favourable treatment than another person in a comparable situation, on the grounds of her sex, age and ethnic origin"³⁸⁸. Before the same Court, she also

Studies (2011) 1635, highlighting that the *Firma Feryn* judgment resolved the difficulty of European legal culture to openly discuss race and ethnicity by "(quite rightly) [conflating] race with nationality without any further discussion" (*ibid.*, 1639 – 1640).

³⁸⁶ Because the employer's justifications were based on his belief that his clients would not want to allow an "immigrant", or a "Moroccan", in their private houses and villas, it may be inferred that this prejudice would have been predominantly directed at foreign men – who are arguably more likely to be perceived as dangerous than foreign women.

³⁸⁷ For a critical analysis of the exclusion of the ground of nationality from the scope of Directive 2000/43, see HOWARD, E., *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU*, Routledge, London, New York, 2010, pp. 186 -188. On the same matter, see also HUBLET, C., 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?', 15(6) *European Law Journal* (2009) 757, p. 764 ff.

³⁸⁸ *Ibid.*, § 29.

sought “the production of the file for the person who was engaged, which would enable her to prove that she [was] more qualified than that person”³⁸⁹.

The main shortcoming of the applicant’s argumentation, however, was that different to the case of *Firma Feryn* the prospective employer had not enounced the reasons for Ms. Meister’s rejected application and refused to do so. Therefore, Ms. Meister could only speculate about the discriminatory nature of the rejection. As a result, the Court of Justice was prevented from examining the applicant’s claim of multiple discrimination on merit. On the one hand, the Court established that it is for the alleged victims of discrimination to submit facts from which such discrimination may be presumed in order to obtain a reversal of the burden of proof – pursuant art. 8(1) of Directive 2000/43, art.10(1) of Directive 2000/78 and art.19(1) of Directive 2006/54³⁹⁰. On the other hand, the Court showed awareness of the fact that Ms. Meister was prevented from acquiring the necessary proof due to the company’s refusal to disclose the reason for its rejection. Therefore, it conceded that “in the context of establishing the facts from which it may be presumed that there has been direct or indirect discrimination, it must be ensured that a refusal of disclosure by the defendant is not liable to compromise the achievement of the objectives pursued by Directives 2000/43, 2000/78 and 2000/54”³⁹¹.

Consequently, the Court concluded that the Directives at issue do not entitle workers “who [claim] plausibly that [they] meet the requirements listed in a job advertisement and whose application was rejected to have access to information indicating whether the employer engaged another applicant at the end of the recruitment process”³⁹². Nevertheless, the Court also left to the discretion of the referring court to determine whether the company’s refusal to grant access to information should be “one of the factors to take into account in the context of establishing facts from which it may be presumed that there has been direct or indirect discrimination”³⁹³. In sum, I would argue that the *Meister* judgment stemmed from an appropriate balancing between the necessity to respect EU non-discrimination law as well as its rules concerning the reversal of the burden of proof, and the need to ensure that potentially discriminating employers do not take advantage of such rules by *de facto* preventing individuals from collecting the necessary proof.

³⁸⁹ *Id.*

³⁹⁰ *Galina Meister v. Speech Design*, cit., § 34.

³⁹¹ *Ibid.*, § 40.

³⁹² *Ibid.*, § 46.

³⁹³ *Ibid.*, § 47.

The examined judgments prompt three general observations on the Court's attitude towards the issue of discrimination in relation to access to employment. Firstly, in the *Jany* case I highlighted how the right to equal treatment with national workers sheds light on the severely discriminatory subtexts of the national authorities' justifications in denying them with a residence permit. Interestingly, the moral nature of such justifications revealed not only sexist attitudes towards foreign prostitutes but also discriminatory stances towards the applicants on the grounds of their being foreigners and immigrants.

This point recalls a second key observation that can be drawn from the examined judgments. In all three, multiple or intersectional discrimination could be observed. In the cases of *Jany* and *Meister*, in particular, the applicants were third-country national women who had been subjected to differential treatment on the grounds of sex, immigrant status, age, ethnic origin and nationality. The Court of Justice, however, did not delve into the merit of this specific issue. For this reason, the case of *Jany* has been criticised by scholars who have noted how, in addition to considering the nationality angle, the Court may have missed an opportunity to analyse the intersecting discrimination ground of sex³⁹⁴. Similarly, the lost multiple discrimination dimension in the case of *Firma Feryn* has been pointed out by those who have observed how a gendered dimension may have been observable in the race discrimination performed by the prospective employer "[if] the assumption was that those at home during the daytime would be largely ethnic majority females and that they would be frightened by having an ethnic minority male around"³⁹⁵. A close observation of the future developments of the European Court of Justice's case law on this matter is nonetheless

³⁹⁴ See for instance Schiek, D., Mulder, J., 'Intersectionality in EU Law', cit., p. 262, and Burri, S., Schiek, D., *Multiple Discrimination in EU Law*, cit., p. 7. In particular, it has been observed that in the case of *Jany et al.* "the European Court of Justice could have considered, at least in theory, whether restriction of free movement of a predominantly female group of workers would be in conflict with the principle of gender equality as a general principle of Community law" (Burri, S., Schiek, D., *Multiple Discrimination in EU Law*, cit., p. 7). Although the Community arguably lacked competence on the issue of gender equality at the time of the *Jany* judgment, it has been argued (*Ibid.*, pp. 7-8) that a consideration of the fundamental right to equality regardless of sex could have been based on the Member States' obligation to comply with general principles of Community law when relying on the exception of public policy to restrict freedom of movement. Indeed, the Court had previously and repeatedly affirmed that sex equality was among said general principles (*ibid.*, p. 8, note 22).

³⁹⁵ Schiek, D., Mulder, J., 'Intersectionality in EU Law', cit., p. 263. Such an interpretation of the *Firma Feryn* case may appear rather far-fetched at first, but a more careful consideration of Moroccan migration to Europe suggests that the Court could have in fact considered the case in this light. It has indeed been shown that while the female component of migratory fluxes of Moroccans to Europe is quite significant, women tend to concentrate in the tertiary sector (KHACHANI, M., *L'Émigration au Féminin: Tendances Récentes au Maroc*, CARIM Notes d'Analyses et de Synthèse 2009/26 – Module Démographique et Économique, Robert Schuman Centre for Advanced Studies, Institut Universitaire Européen, 2009, especially p. 6 ff.). Thus, the Court could have easily inferred that most immigrant workers of Moroccan origin pursuing jobs as door installers were male. Together with the high likelihood that these workers would be considered as a threat not only because of their ethnic origin but also because of their gender, such a consideration could have brought to the Court's attention the specific type of double discrimination suffered by this group.

demanded. In particular, the open and non-exhaustive list of grounds of discrimination included in article 21 of the Charter may foster an organic and intersectional reading of the different sources available under EU secondary law so as to cover multiple discrimination more effectively, expanding the protections available to immigrant women workers under European law.

Lastly, the clarifications offered by the Court of Justice in the *Firma Feryn* and *Meister* judgments concerning the horizontal effects of the right to non-discrimination as specified in the EU anti-discrimination legal framework appear specifically significant for immigrant women. I have indeed stressed the importance of enforcing fundamental rights of workers and particularly the fundamental right to access employment in conditions of non-discrimination for immigrant women, due to the fact that this category disproportionately encounters sources of vulnerability and subordination in their employment relationships.

4. Concluding Remarks

The norms of European law examined in this chapter have revealed several gendered shortcomings with respect to immigrant women's family life and employment. The two realms, however, revealed to be affected by different types of issues. Regarding family life, many of the highlighted limitations of European immigration law are not imputable to directly problematic norms established by these sources. Rather, they stem from what I would qualify as an excessive discretionary power left to Member States in crucial aspects of immigrant women's lives in the European legal space. I have stressed, for instance, how allowing Member States to impose purely economic prerequisites as a gateway to sponsor family reunification – on the grounds of an unviable breadwinner model – produced a disparate impact on immigrant women's access to their right to family life.

In relation to the field of employment, on the other hand, I have shown how the most problematic aspect of EU law applicable to immigrant women workers relates to the difficulty of this legal framework to effectively capture the complex experiences of discrimination affecting this category. This relates not only to the lack of a thorough normative consideration of multiple or intersectional discrimination in the establishment of Member States' obligations in this field, but also to a partial coverage by the relevant legal sources of discrimination grounds commonly experienced by immigrant women.

Against this background, the aim of this chapter was to explore the possible role of EU fundamental rights law in correcting the observed gendered shortcomings. In order to do so, I turned to the European Court of Justice's case law, focusing on specific judgments that I believe to offer important clues in this respect. A first general observation that can be made concerns the fact that only some of the problematic aspects of EU law were actually addressed by the Court, especially from the specific point of view of European fundamental rights law. However, it must be noted that the Court's judicial experience with respect to the enforcement of fundamental rights is much more recent than that of the Strasbourg Court. Therefore, the fact that judicial examples of interpretations of European immigration law (and of national provisions implementing it) are still quite sparse cannot be imputed to a supposed weakness of EU fundamental rights in comparison to European human rights law, but rather to the relatively recent adoption of the European Charter and to its even more recent acquisition of binding force. Increasingly, the European Court of Justice is incorporating fundamental rights in its judicial interpretation and there are many reasons to believe that this system's influence will grow in the near future.

As to the specific influence of EU fundamental rights law on gendered shortcomings of secondary norms of EU law applicable to immigrant women, my analysis of selected judgments by the Court of Justice produced mixed results. In the field of family life, the breadwinner model embraced by the discussed norms on family reunification was actually reinforced by the Court on the grounds of fundamental rights and freedoms recognised by EU primary law. The case law on carers' enjoyment of family life on the territory of the Union might appear a positive development in this sense, because of its recognition of residence rights to third-country nationals on the grounds of unpaid care work, rather than on purely financial grounds. In other words, these judgments appeared to develop an alternative route of access to the enjoyment of family life that was not linked to purely financial requirements.

However, a closer look has revealed how the Court of Justice ultimately reinforced a rigid distinction between productive and reproductive work by granting carers with residence rights that were strictly functional to the exercise of Union citizen's fundamental rights and freedoms, rather than justified by carers' own fundamental rights. The breadwinner model currently inherent in EU family migration norms was thus not undermined but actually reinforced by the Court of Justice. In this sense, the question of the potential of fundamental rights to expose and reverse the disparate impact of the discussed norms remains unanswered. As I have stressed above, the route currently followed by the Court of Justice not only reinforces normative models that generate a disparate impact and indirect discrimination on

immigrant women, but also leaves out third-country national women whose spouses or children are not Union citizens. The submission of judicial claims of violation of the fundamental right to family life in conjunction with the right to non-discrimination pursuant arts. 7 and 21 of the Charter may constitute an effective alternative strategy for exposing the disparate impact of the breadwinner model underlying the discussed norms. Admittedly, in *Parliament v. Council*³⁹⁶ the Court of Justice has not appeared responsive to the claim that European Union law may violate fundamental rights by leaving Member States with the possibility to implement its norms in ways that are contrary to the Charter. Nonetheless, I argue that efforts to overturn this position should be made in order to bring the Court's attention to the negative effects on immigrant women of EU family migration norms that do overlook their specific difficulties. By doing so, it will be possible to highlight how the very level of discretion left to Member States in crucial areas for this category translates into severe barriers to the possibility to enjoy the rights recognised in these sources at all. As AG Kokott observed in her Opinion on *Parliament v. Council*, the “ambiguity on account of the failure to take account of hardship situations increases the risk that human rights will be infringed”³⁹⁷.

Moving to the employment domain, I have observed how art. 15 of the Charter may be of limited help for immigrant women workers, in particular with reference to their possibility to access employment in conditions of equality and non-discrimination with Union citizens. The Court of Justice, on its part, did not offer any judicial examples of application of this article to immigrant women workers' access to employment or enjoyment of non-discrimination in the workplace. I therefore turned my attention to the existing protections against discrimination as envisaged by secondary EU law. The judicial examples of interpretation of relevant sources in this area offered by the Court of Justice revealed both strengths and weaknesses of this system. On the one hand, the *Jany* case³⁹⁸ provided a good illustration of how the principle of non-discrimination can be interpreted to reveal gendered subtexts underlying national immigration policies. On the other hand, the examined judicial examples on the horizontal effects of the EU anti-discrimination regime confirm the importance of considering multiple and intersectional discrimination in this realm. At least with respect to working conditions, arts. 15 and 21 of the Charter may have a role to play in this, provided that the latter may be

³⁹⁶ *Parliament v. Council*, cit.

³⁹⁷ Opinion of Advocate General Kokott, *Parliament v. Council*, cit., § 105.

³⁹⁸ *Jany and Others*, cit.

reasonably interpreted as also prohibiting indirect discrimination and effectively used as a ground to tackle multiple and intersectional discrimination in the workplace. In this respect, although it did not concern employment discrimination, the *B.S. v. Spain*³⁹⁹ judgment by the European Court of Human Rights may constitute a useful reference for the Court of Justice, since here the right to non-discrimination enshrined in art. 14 of the European Convention on Human Rights was also interpreted as prohibiting intersectional discrimination.

³⁹⁹ *B.S. v. Spain*, cit.

CHAPTER THREE

The Italian Case:

Immigrant Women in Italy

and Their Fundamental Rights in the Fields of Family and Employment

Introduction

The Italian case study reproduces the situation of immigrant women in the European legal space in multiple respects. While the female component of immigration fluxes to Italy is very varied in terms of national, religious, social and cultural background, immigrant women in Italy as a group reflect many of the problems I have outlined in the general introduction as common issues that disproportionately affect third-country national migrant women in comparison to male migrants on the one hand and female and male Italian citizens on the other.

Until 1991, foreigners residing in Italy never amounted to more than 1% of the total population. Italy was mainly a country of emigration for the century following the Unification of Italy in 1861 – with more than 30 million Italians emigrating abroad⁴⁰⁰. Since the 1990s, however, Italy has increasingly become a country of immigration, with almost two million third-country nationals residing on the national territory in 2011 – among which Moroccans are the most present community, followed by Albanians, Chinese, Ukrainians, Filipinos, Moldavians, Peruvians and Tunisians⁴⁰¹. The female component of such migration fluxes is very significant. In 2010, over half of the foreigners residing in Italy were women (51.8%)⁴⁰².

Italian law touches upon relevant aspects of immigrant women's family life and employment not only in its immigration regime but also in its anti-discrimination legislation. The relevant

⁴⁰⁰ Caritas/Migrantes, *Dossier Statistico Immigrazione*, 21st Report, 2011.

⁴⁰¹ Caritas/Migrantes, *Dossier Statistico Immigrazione*, 22nd Report, 2012. For an accurate account of the various communities of migrants present in Italy, see the Report's Summary, p. 2, available at http://www.dossierimmigrazione.it/docnews/file/2012_Dossier_Scheda.pdf. It has been noted that this has not even been reduced by the economic crisis. In fact, in 2009 – characterised by one of Italy's worst GDP performances in the last thirty years – the foreign population on the national territory increased from the previous year. However, it must not be overlooked that this increase was also due to a higher demand for low-skilled and flexible jobs, and that foreigners who met such demand also had to endure worse labour conditions (SCIORTINO, G., 'Immigration in Italy: Subverting the Logic of Welfare Reform?', in Jurado, E., (ed.), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility*, I.B. Tauris, London, 2013).

⁴⁰² Caritas-Migrantes, *Rapporto Immigrazione* 2011, cit.

aspects of these different regimes are not scattered in different sources, but for the most part they are gathered in the so-called *Testo Unico Immigrazione* (from now on, *T.U.*)⁴⁰³. This law does not simply constitute the main text of reference of Italian immigration law but it also encompasses relevant norms in the field of employment, family life and non-discrimination. In addition to the *T.U.*, several legislative or regulatory sources contribute to forming the relevant regime for immigrant women.

From the outset, it is important to highlight that the *T.U.* touches upon third-country nationals' fundamental rights in its article 2, entitled "rights and obligations of foreigners". On the one hand, article 2(1) establishes that "foreigners at any title present on Italian frontiers or territory are recognised with the fundamental rights of the human person envisaged by domestic law, international conventions in force and general principles of law recognised by civilised nations". Art. 2(2), on the other hand, establishes that regularly staying foreigners "enjoy civil rights recognised to Italian citizens, except when international conventions enforced by Italy and this *Testo Unico* state otherwise". Moreover, in relation to workers, art. 2(3) recalls the ILO Convention n. 143 of 1975⁴⁰⁴ and guarantees to all foreign workers regularly residing on the national territory and to their families "equal treatment and full equality of rights with respect to Italian workers".

Title II of the *T.U.* establishes norms on the entry, residence and expulsion of "foreigners"⁴⁰⁵ from the national territory. The Italian immigration regime is based on a wide range of residence permit types depending on the reason of entry and residence on the national territory (family reasons, employment, self-employment, seasonal work, study, asylum or subsidiary protection, medical reasons, and so forth). In addition to the norms of the *T.U.*, the conditions for renewing and converting residence permits (including the possibility of third-country national workers to change employer or type of employment) are regulated by Presidential Decrees n. 394 of 1999⁴⁰⁶ and n. 334 of 2004⁴⁰⁷.

⁴⁰³ *Decreto Legislativo* no. 286 of 25 July 1998, or *Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero*, *G.U.* no. 191 of 18 August 1998, *S.O.*

⁴⁰⁴ Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted on 24 June 1975 and entered into force on 9 December 1978. Italy ratified this Convention with Law n. 158 of 10 April 1981 (*G.U.* no. 116 of 29 April 1981).

⁴⁰⁵ To clarify, the expression "foreigners" used by the *T.U.* refers to third-country national or stateless migrants. Pursuant art. 1(2), the *T.U.* does not apply to Union citizens in Italy unless it establishes more favourable norms than those of the legislation normally applicable to them. For the purpose of this chapter, I will use the terms "foreigners" or "immigrants" to refer to third-country nationals entering and residing in Italy.

All quotations from the *Testo Unico* and other Italian provisions of law in this chapter, except when stated otherwise, are my own translations from the Italian.

⁴⁰⁶ *Decreto del Presidente della Repubblica* no. 394 of 31 August 1999, *G.U.* no. 258 of 3 November 1999, *S.O.*

⁴⁰⁷ *Decreto del Presidente della Repubblica* no. 334 of 18 October 2004, *G.U.* no. 33 of 10 February 2005.

In the field of family migration, Title IV of the *T.U.* is devoted to “the right to family unity and the protection of minors”. Its main focus is on providing rules on the issuing, maintenance and loss of residence permits for family reasons. For immigrant women entering Italy through family migration, the key legislation is provided by article 30 of the *T.U.*, which grants residence permits “for family reasons” to foreigners pursuing family reunification, or accompanying family members who enter the national territory (let. a), as well as on grounds of marriage with an Italian or Union citizen or with a regularly staying foreigner (let. b), and to regularly staying family members of Italian or Union citizens or of regularly staying foreigners when they satisfy the requisites for family reunification (let. c).

Beyond the *T.U.*, immigrant women pursuing family reunification with Italian or European family members benefit from a more favourable regulation under d.lgs. 30/2007⁴⁰⁸ enforcing Directive 2004/38 in the Italian order. Interestingly, art. 23 of d.lgs. 30/2007 extended the more favourable provisions of Directive 2004/38 to purely internal situations concerning non-Italian family members of Italian citizens. Therefore, while the Directive only includes within its scope Union citizens moving and residing on the territory of a Member State different than their own, d.lgs. 30/2007 also applies to Italian citizens living in Italy and sponsoring reunification with a non-Italian family member (including third-country nationals).

In the field of employment, under the *T.U.* residence permits may be released for the purpose of employment, self-employment, seasonal work, and “pending employment”. The latter type of permit is granted in case of redundancy or unemployment provided that immigrant workers enrol in jobseekers’ lists pursuant art. 22(11). Other permits envisaged by the *T.U.* have been introduced to receive Directive 2003/109 and Directive 2009/50 in the Italian order. In particular, art. 9 of the *T.U.* provides foreigners with the possibility of obtaining long-term residence permits of unlimited duration under the conditions of having held a residence permit for at least five years as well as of satisfying income and housing requirements. Art. 27-*quater*, on its part, regulates foreigners’ access to the EU Blue Card for highly qualified workers. Against this background, art. 2 and art. 29 of the *T.U.* provide that every year the Italian Prime Minister releases a programme establishing a maximum number of quotas of foreigners to admit for the following year for the purpose of employment or self-employment. Visas and residence permits issued for that year must respect this threshold,

⁴⁰⁸ *Decreto Legislativo* no. 30 of 6 February 2007, implementing Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *G.U.* no. 72 of 27 March 2007.

although further decrees on quotas may be issued during the year. These quotas do not apply to highly qualified workers pursuing Blue Cards.

Italian law appears to pay a special attention to third-country national domestic workers. For instance, this category is included – together with other professions of particular interest from a gendered point of view such as entertainers and professional nurses – by art. 27 of the *T.U.* among those workers who can enter Italy beyond the annual quotas established by the Government. In other words, these categories of workers may enter Italy in an indeterminate number, also beyond the thresholds established for other third-country national workers⁴⁰⁹. Furthermore, in order to encourage third-country national domestic workers to move away from informal work, law n. 102 of 1999⁴¹⁰ established a special regularisation procedure which both Italian and foreign employers residing in Italy can follow. Considering that irregularly employing third-country nationals in any sector is a crime punished by art. 22(12) of the *T.U.* with detention from six months to three years and with fines of 5,000 Euros per employee, this regime offers a more favourable treatment for employers who report themselves to the authorities by only imposing a lump-sum payment of 500 Euros. Incidentally, it must be noted that in connection with the protection of all third-country national workers from exploitation (which is arguably more likely to occur in informal employment), art. 22(12-bis) and art. 22(12-quater) of the *T.U.* also envisage more severe penalties for the irregular employment of third-country national workers if the latter are subjected to exploitation while granting them with a special residence permit valid for up to one year or for the entire duration of criminal proceedings against their employers.

Moving on to the Italian anti-discrimination regime relevant for third-country national women, sex discrimination and limitations to equality are tackled by several sources of law. The *Testo Unico* dictated by legislative decree 151/2001⁴¹¹, for instance, establishes a wide range of rights for pregnant workers with the aim of sustaining maternity and paternity. Sex equality is also at the core of the so-called “Equal Opportunities Code” (*Codice delle Pari Opportunità*)⁴¹², which tackles direct and indirect sex discrimination⁴¹³ as well as harassment

⁴⁰⁹ Article 27(1)(e) of the *T.U.* however envisages this possibility exclusively for domestic workers who have already worked as such for at least one year in a foreign country for Italian or Union citizens residing abroad and moving to Italy.

⁴¹⁰ *Legge* no. 102 of 3 August 2009, *G.U.* no. 179 of 4 August 2009, *S.O.*, which converted into law the previously established *decreto legge* no. 78 of 1 July 2009.

⁴¹¹ *Decreto Legislativo* no. 151 of 26 March 2001, *Testo Unico sulla Maternità e Paternità*, *G.U.* no. 151 of 26 March 2001.

⁴¹² *Decreto Legislativo* no. 198 of 11 April 2006, *Codice delle Pari Opportunità*, *G.U.* no. 125 of 31 May 2006.

as a form of discrimination. The Code was amended in 2010 by legislative decree n. 5, which transposed in the Italian order Directive 2006/54 on equal opportunities in the field of employment⁴¹⁴.

Both sources, however, appear to set aside (for better or worse) domestic workers as a specific category. On the one hand, the *Testo Unico* on maternity and paternity includes domestic workers in a separate section dedicated to specific professions, recognising them in this context with a right to maternity and paternity leave under article 63. Moreover, it is extremely significant that article 74 on the right to maternity cheques expressly excludes from its scope of applications third-country nationals who do not hold a long-term resident permit. On the other hand, article 35 of the Equal Opportunities Code – establishing a prohibition of dismissal for reasons connected to marriage –explicitly excludes domestic workers from its scope of application⁴¹⁵.

As for race discrimination, legislative decree n. 216 of 2003⁴¹⁶ received Directive 2000/43 in the Italian order, reproducing the norms and definitions of the Directive. Interestingly, the *T.U.* also contains anti-discrimination provisions with reference to race and ethnic origin. In particular, article 43 prohibits discrimination on the grounds of race, ethnic origin, national origin or religion, specifying this principle in several areas such as employment, exercise of economic activities and interaction with public authorities. In addition to this, article 44 envisages a specific civil action to counter discrimination on the mentioned grounds.

Despite the fact that immigrant women constitute a significant portion of the total number of foreigners residing in Italy – the *Testo Unico Immigrazione* explicitly mentions them only in two instances, and exclusively in relation to pregnancy and early maternity. In particular, art.

⁴¹³ Art. 25(1) of the Code defines direct discrimination as “any act, pact or behaviour which causes a detrimental effect discriminating female or male workers on the grounds of their sex and, in any case, less favourable treatment compared to that of another female or male worker in a comparable situation”, while art. 25(2) clarifies that indirect discrimination occurs when “an apparently neutral provision, a criterion, a praxis, an act, a pact or a behaviour puts or can put workers of a determinate sex in a particularly disadvantaged position compared to workers of the other sex, except when they concern essential requirements for the carrying out of the work activity, provided that the scope is legitimate and the means used for its realisation are appropriate and necessary”. Article 26 defines harassment as “unwanted behaviour brought about for reasons related to sex, with the aim or the effect of violating a female or male worker’s dignity and to create an intimidating, hostile, degrading, humiliating or offensive environment”, and sexual harassment as “unwanted behaviour with sexual undertones, expressed in physical, verbal or non verbal form, having the aim or the effect of violating a female or male worker’s dignity and to create an intimidating, hostile, degrading, humiliating or offensive environment”.

⁴¹⁴ *Decreto Legislativo* no. 5 of 25 January 2010, *G.U.* no. 29 of 5 February 2010.

⁴¹⁵ See art. 35(9) of the Code.

⁴¹⁶ *Decreto Legislativo* no. 216 of 9 July 2003, *G.U.* no. 187 of 13 August 2003. In connection to this, Directive 2000/78 was received by *decreto legislativo* no. 215 of 2003 (*G.U.* no. 186 of 12 August 2003).

19(1)(d) of the *T.U.* establishes a prohibition to expel immigrant women during pregnancy and the first six months after giving birth, while art. 35(3)(a) grants irregularly staying women with a right to receive social protection during pregnancy and maternity in conditions of equality with Italian citizens. In addition to this, it appears that the recent introduction of a special permit for victims of domestic violence in art. 18-*bis* also implicitly aims at protecting immigrant women's rights to physical and psychological integrity.

Beyond this normative focus on the protection of immigrant women during critical situations, the Italian *T.U.* is characterised by a lack of provisions taking into account immigrant women's specific needs in the fields of family life and employment. Nevertheless, immigrant women in Italy have been identified as a category at higher risk of social exclusion⁴¹⁷. Multiple discrimination on the grounds of race, ethnicity, culture, religion, or age has been pointed out as one of the main causes of this phenomenon⁴¹⁸. Research conducted in the highly industrialised region of Lombardy, for instance, has unveiled how third-country national women workers experience strong precariousness and lack of upwards mobility due to some employers' discriminatory attitudes⁴¹⁹. Such discrimination on the intersecting grounds of sexism and racism can severely affect immigrant women's freedom in determining their reproductive choices due to the fear of jeopardising their employment relationships⁴²⁰. On a broader level, immigrant women have been identified by the CEDAW Shadow Report on Italy as suffering from multiple discrimination on grounds of gender, ethnic origin and age which affect their family relationships as well as the relations with their communities of origin⁴²¹. Immigrant women in domestic work, in particular, are affected by specific kinds of discrimination that foster their vulnerability and deeply affect their access to employment as well as their employment conditions⁴²². As a result of their disproportionate vulnerability to multiple discrimination, immigrant women are affected by "ethnic penalties" and a consequently heavier social disqualification than their male counterparts⁴²³.

⁴¹⁷ BONETTI, P. (ed.), 'Osservatorio Italiano', 2 *Diritto, Immigrazione e Cittadinanza* (2007) 219, p. 222, [translation mine].

⁴¹⁸ *Id.*

⁴¹⁹ AIRAGHI, G., GARAVAGLIA, E., 'Donne Straniere, Famiglia e Lavoro: le Evidenze della Ricerca sul Campo', in Colasanto, M., Marcaletti, F., (eds.), *Famiglie Immigrate, Tempi di Vita e Tempi di Lavoro: la Conciliazione Come Questione Emergente– Rapporto 2011*, Fondazione ISMU, Milan, Italy, 2012, p. 66.

⁴²⁰ *Ibid.*, p. 67.

⁴²¹ Italian Platform *Lavori in Corsa: 30 Anni CEDAW, Rapporto Ombra in Merito allo Stato di Attuazione da parte dell'Italia della Convenzione ONU per l'Eliminazione di Ogni Forma di Discriminazione nei Confronti della Donna (CEDAW) in Riferimento al VI Rapporto Presentato dal Governo Italiano nel 2009*, June 2011, p. 134.

⁴²² *Ibid.*, p. 135.

⁴²³ FULLIN, G., REYNERI, E., 'Low Unemployment and Bad Jobs for New Immigrants in Italy', 49(1) *International Migration* (2011) 118, p. 135 ff. See also CAMPANI, G., CHIAPPELLI, T., CABRAL, I., MANETTI, A., *Mapping of Policies*

Interestingly, it has been highlighted that even those groups of immigrant women characterised by high employment rates in the Italian labour market, such as Asian women, are at high risk of achieving lower social positions due to such ethnic penalties⁴²⁴. Even achieving higher education does not support immigrant women's access to higher social positions in the Italian context, but rather further highlights their penalisation⁴²⁵. This is for instance the case of Filipino women, who despite their high education rates disproportionately concentrate in the domestic work sector.

More strictly in relation with the field of employment, immigrant women's situation on the Italian labour market mirrors the broader European context as to the over-qualification, de-skilling, and high concentration in low paid, unregulated and unprotected sectors disproportionately affecting this category of workers⁴²⁶. The general participation of immigrant women in the Italian labour market is lower than that of Italian women as well as their male counterparts. Some exceptions are represented by specific national groups such as those from China or the Philippines who have higher activity rates than Italian women, while immigrant women from Northern Africa and Central Southern Asia experience more difficulties in this respect⁴²⁷. Employment rates of immigrant women and their gap in comparison to female citizens' employment also vary depending on regional areas, since in Northern Italian regions employment rates of immigrant women are substantially lower than those of Italian women, while in the South of Italy (characterised by high female unemployment) immigrant women are actually employed more than their Italian counterparts⁴²⁸. The distribution of immigrant women in the Italian labour market is also very much linked to ethnic origin and gender. Immigrant workers in general concentrate in the tertiary sector and in agricultural activities; and within national groups mainly employed in domestic services, immigrant women constitute around 70% of the total⁴²⁹.

In the field of family, it has been shown that having children and being in a couple constitutes the main obstacle for immigrant women's participation in the Italian labour market. This confirms the presence of "a breadwinner model assigning the production of

Affecting Female Migrants and Policy Analysis: the Italian Case, Working Paper No. 6, Florence, Italy, December 2006, p. 5.

⁴²⁴ *Ibid.*, pp. 138 – 139.

⁴²⁵ *Ibid.*, p. 140.

⁴²⁶ See for instance Airaghi, G., Garavaglia, E., 'Donne Straniere, Famiglia e Lavoro', cit., p. 65.

⁴²⁷ Fullin, G., Reyneri, E., 'Low Unemployment', cit., p. 126.

⁴²⁸ Campani, G., Chiappelli, T., Cabral, I., Manetti, A., *Mapping of Policies Affecting Female Migrants*, cit., p. 6.

⁴²⁹ *Ibid.*, p. 7.

secondary income to women, as a integration to the primary income produced by men⁴³⁰. Immigrant women experience severe difficulties in reconciling work and family life due to the absence of kin networks in their host country and to the low accessibility or actual lack of childcare services in Italy⁴³¹. Moreover, it has been noted that migrant women run a disproportionate risk of suffering from violence and harassment in both the family and the employment realm, due to their economic dependence from spouses in the context of family reunification and from employers in the context of domestic work in particular⁴³². Immigrant women experience inequality within the family very commonly in Italy, both because they carry disproportionate care burdens and because of cultural reasons⁴³³.

The Italian context does not simply epitomise the general factual difficulties disproportionately experienced by immigrant women in the broader European legal space. More importantly, indeed, Italian law also presents several critical features that can significantly aggravate these factual disadvantages. Several norms of the *T.U.* – despite their apparent gender-neutral character – are likely in my view to negatively and disproportionately affect immigrant women’s enjoyment of their rights in relation to family life and employment. This disparate impact can either stem from structural limitations of national norms themselves, which may fail to consider these specific needs, or by biased interpretations of such norms by the authorities in charge of their implementation. Notably, these problems affect not only general legislation (such as the Italian family reunification regime or the legal framework on labour migration), but also specific norms that are supposedly established for immigrant women’s protection (such as for instance the rules on special permits for pregnancy and early maternity). On the other hand, a multi-level system of fundamental rights protection resulting from both supranational and national sources is currently in force in the Italian order. Some of the fundamental rights established by this system appear to bear a particular potential to produce a significant impact on immigrant women’s lives in Italy.

In the light of these observations, in this chapter I will analyse the interaction between Italian norms applicable to immigrant women and the multi-level system of fundamental rights law

⁴³⁰ MARCALETTI, F., ‘Genere, Lavoro e Redditi degli Immigrati a Partire dai Dati Orim e dalle Rilevazioni su Offerta e Domanda di Lavoro’, in Colasanto, M., Marcaletti, F., (eds.), *Famiglie Immigrate, Tempi di Vita e Tempi di Lavoro*, p. 40. The Report discusses immigrant women in general, regardless of whether they are third-country nationals or Union citizens.

⁴³¹ Fullin, G., Reyneri, E., ‘Low Unemployment’, cit., p. 131.

⁴³² BONETTI, P. (ed.), ‘Osservatorio Italiano’, 2 *Diritto, Immigrazione e Cittadinanza* (2007) 219, p. 222.

⁴³³ Marcaletti, F., ‘Genere, Lavoro e Redditi degli Immigrati’, p. 86.

in force in this country. The aim of this analysis is to enquire into whether and in what ways this interaction was actually fruitful for immigrant women in Italy, and to look at possible ways to enhance its impact in this area in positive ways. In order to do so, I will firstly provide an overview of Italian fundamental rights law, focusing not only on the Italian Constitution⁴³⁴ but also on the reception of supranational sources of human and fundamental rights law in the domestic order. Secondly, I will critically discuss specific provisions of Italian law that are, in my view, particularly problematic for this category, first in the field of family life and then in field of employment. For both realms, I will follow the two-step approach applied in the previous chapter. A first step, therefore, will consist in an assessment of the gendered shortcomings of the Italian immigration regime– or of other Italian laws applicable to immigrant women – in the light of this category’s fundamental right to family life and employment as recognised by the multi-level system of protection in force in the Italian order. In a second step, I will focus on the potential of these fundamental rights to unveil and correct the observed shortcomings.

1. Fundamental Rights in the Italian Legal System

The Italian Constitution establishes a broad and diverse range of fundamental rights in the fields of family and employment. On a general level, article 2 of the Constitution provides that “[the] Republic recognises and guarantees the inviolable rights of the person, as an individual and in the social groups within which human personality is developed”, requiring “that the fundamental duties of political, economic and social solidarity be fulfilled”⁴³⁵. In connection to this, article 3 establishes that “all citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions”, envisaging a duty of the Italian State “to remove the economic and social obstacles which by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country”.

This first bundle of constitutional provisions grants a fundamental right to equal treatment and non-discrimination not only to Italian citizens, but to all individuals present on the

⁴³⁴ *Costituzione della Repubblica Italiana*, G.U. no. 298 of 27 December 1947.

⁴³⁵ Official translation of the Italian Constitution, available at http://en.camera.it/application/xmanager/projects/camera_eng/file/costituzione-aggiornata_EN_10_10_12.pdf. For the purpose of this section, all English quotations of the Italian Constitution should be understood as extracted from this document.

national territory. While article 2 is universal in character, embodying the fundamental principle whereby the human being is at the heart of the legal system⁴³⁶, the explicit reference to “citizens” by article 3 may support a restrictive interpretation whereby the principle of equality established by this provision may not apply to foreigners. However, an organic reading of this principle in the context of the entire Constitution – and especially in conjunction with the expression “inviolable rights of the person” adopted by art. 2 – has allowed the Constitutional Court to clarify that “while it is true that article 3 expressly refers exclusively to citizens, it is equally certain that the principle of equality also applies to foreigners” when the respect of their “inviolable rights of the person” is involved⁴³⁷. Thus, foreigners also enjoy the right to equality and non-discrimination in relation to all those rights that are recognised to them simply by virtue of their quality of human beings, rather than as citizens.

The combination of the principles established by articles 2 and 3 of the Italian Constitution may also be specifically important for immigrant women victims of multiple discrimination. It has been rightly noted⁴³⁸ in this respect that, just like the European Convention on Human Rights – and I would add just like the Charter of Fundamental Rights of the European Union – the Italian Constitution envisages an open list of possible discrimination grounds. This factor arguably increases the capability of the Italian Constitutional system to effectively tackle multiple discrimination, also on grounds not explicitly mentioned by anti-discrimination law⁴³⁹.

As to the fundamental rights in the field of family, article 29 of the Constitution provides that “[the] Republic recognises the rights of the family as a natural society founded on marriage”. Very importantly, this articles moves on to clarify that “marriage is based on the *moral and legal equality of the spouses* [emphasis added] within the limits laid down by law to guarantee the unity of the family”. The fundamental rights protected by the Italian Constitution in the field of family therefore also encompass a fundamental right to equality within the family and

⁴³⁶ Italian legal doctrine has referred to this principle as “principio personalista”. See for instance BONETTI, P., *La Giurisprudenza Costituzionale sui Diritti Fondamentali degli Stranieri e le Discriminazioni*, paper presented at the Conference *La Tutela del Migrante dalle Discriminazioni Fondate sulla Nazionalità e/o sul Fattore Etnico-Razziale* [Protection of Migrants from Discrimination on the Grounds of Nationality and/or Ethnic-Racial Origin, ed.], Associazione Studi Giuridici sull’Immigrazione, Sassomaroni-Bologna, 22-24 September 2011, p. 2.

⁴³⁷ Bonetti, P., *La Giurisprudenza Costituzionale*, cit., p. 5. The extracts refer to the Italian Constitutional Court judgments no. 120 of 15 November 1967 and no. 104 of 19 June 1969.

⁴³⁸ NALDI, E., ‘All’Incrocio di Fattori di Genere e Altri Fattori di Discriminazione’, in Pezzini, B., (ed.), *Genere e Diritto: Come il Genere Costruisce il Diritto e il Diritto Costruisce il Genere*, Bergamo University Press, Bergamo, Italy, 2012, p. 214.

⁴³⁹ *Id.*

in spousal relationships. In relation to parenting, article 30 of the Constitution defines the support, raising, and education of children as both a duty and a right of parents. In connection to this, article 31(1) and (2) respectively provide that “the Republic shall encourage family formation and the fulfilment of related duties, with special regard to large families, through economic measures and other benefits” as well as that “the Republic shall protect mothers, children and the young by adopting the necessary measures”.

The affirmation of the principle of equality between men and women within the family in the Italian constitutional order played a crucial role for Italian women themselves, because it supported the bypassing of patriarchal notions underlying the socio-cultural but also normative view of the family sanctioned by the Italian legal order⁴⁴⁰. This principle inspired landmark judgments by the Constitutional Court aimed at ensuring equality between men and women in family matters⁴⁴¹. For instance, the Court declared that the punishment by Italian criminal law of adultery exclusively when committed by the wife clashed with the principle of equality within the family enshrined in art. 29 of the Constitution. Indeed, by enforcing a different treatment between husband and wife which was “not only useless but also harmful to family unity”, the law at issue put the wife “in an inferior position, infringing her dignity and forcing her to endure infidelity and offence, without any protection under criminal law”, granting “a privilege to the husband [which], like all privileges, violates the principle of equality”⁴⁴². Similarly, in the field of citizenship, the Constitutional Court detected a contrast with the constitutional principle of equality (as established on a broad level by art. 3 and specifically in the field of family by art. 29 of the Constitution) in the law concerning acquisition and loss of citizenship⁴⁴³. The Court, in particular, censured the automatic loss of Italian citizenship for women who marry foreigners and acquire the latter’s nationality⁴⁴⁴. In this respect, the Court significantly observed that this norm “[established] an extremely serious inequality between spouses from a moral, legal and political point of view and puts women in a state of clear inferiority, automatically depriving them of the rights attached to Italian citizenship merely because of their marriage”⁴⁴⁵. The support provided by article 29 to a gender-sensitive judicial analysis aimed at unveiling and neutralising legal factors of

⁴⁴⁰ Pezzini, B., ‘La Struttura di Genere della Famiglia nella Giurisprudenza Costituzionale’, in Pezzini B., (ed.), *Genere e Diritto*, cit., p. 45 ff.

⁴⁴¹ *Id.*

⁴⁴² *Corte Costituzionale*, sentenza no. 126 of 16 December 1968, § 6 of Legal Grounds. Where not otherwise specified, all English translations of Italian judgments in this chapter should be understood as mine.

⁴⁴³ *Legge* no. 555 of 13 June 1912.

⁴⁴⁴ Art. 10(3) of *Legge* no. 555 of 1912.

⁴⁴⁵ *Corte Costituzionale*, judgment no. 87 of 9 April 1975, § 2 of Legal Grounds.

subordination which breach women's dignity within the family suggests that, at least in principle, this constitutional provision may represent an important reference for immigrant women in Italy.

Moving on to the field of employment, article 4 of the Italian Constitution establishes a fundamental right to work with exclusive reference to "citizens". On the other hand, article 35 envisages a general obligation of the State to "protect work in all its forms and practices". The following paragraphs of this article specify this obligation in the sense of providing professional or vocational training and "advancement for workers" – art. 35(2) - and of promoting and encouraging international agreements and organisations aiming to establish and regulate labour rights – art. 35(3). In addition to these broader State obligations, specific fundamental rights are recognised by article 38(2) –which states that "[workers] have the right to be assured adequate means for their subsistence needs in the case of accident, illness, disability, old age and involuntary unemployment"⁴⁴⁶, and article 40–grounding a fundamental right to "industrial action" to be exercised in compliance with the law.

Articles 36 and 37, on their part, have been pointed out as adopting "a language full of gender stereotypes"⁴⁴⁷. Admittedly, while article 36 refers to *lavoratori*, i.e., male workers, article 37 is devoted to the *donna lavoratrice*, i.e., the female worker, in an apparent division of the rights of male and female workers. Article 36, in particular, grants a fundamental right to "a remuneration commensurate to the quantity and quality of their work and in all cases to an adequate remuneration ensuring [workers] and their families a free and dignified existence". Art. 36(2) also states that maximum daily working hours must be established by law, while art. 36(3) provides workers with a fundamental right to weekly rest and paid annual holidays. Article 37(1), on the other hand, establishes that "working women have the same rights [*of men workers, ed.*] and are entitled to equal pay for equal work", and that "working conditions must allow women to fulfil their essential role in the family and to ensure specific appropriate protection for the mother and child". However, as suggested by a closer look to the rights established by articles 36 and 37, its provisions are actually "norms of anti-discriminatory guarantee and not norms prescribing family roles"⁴⁴⁸. This interpretation was also confirmed by the Constitutional Court in the context of a judgment extending access

⁴⁴⁶ Article 38(3) also provides that these tasks must be performed "by bodies and institutions established or supported by the State".

⁴⁴⁷ Pezzini, B., 'La Struttura di Genere', cit., p. 58 [translation mine].

⁴⁴⁸ *Id.* [translation mine].

to childcare-related leave to male workers⁴⁴⁹. Here, the Court observed an increasing tendency at the normative level to “modify the functions of men and women within the family, also with the aim of allowing a different balance between the latter’s role of mothers and their extra-domestic work”⁴⁵⁰ and that the norms at issue “[impeded] the fulfilling of childcare duties which are assigned to the equal responsibility of parents by art. 30, paragraph 1”⁴⁵¹. Lastly, art. 41(2) of the Constitution appears of relevance in relation to immigrant women’s right to be free from labour exploitation. This provision, indeed, establishes that economic initiative in the private sector “cannot be conducted in conflict with social usefulness or in such a manner that could damage safety, liberty and human dignity”.

In addition to the Constitution, another important source of fundamental rights is provided by customary and conventional international law instruments received in the Italian order. The Italian Constitution regulates the process of adaptation of domestic law to customary and conventional international law (including human and fundamental rights sources) respectively at article 10(1) and article 117.

Article 10(1) states that “[the] Italian legal system conforms to the generally recognised rules of international law”, envisaging a process whereby international customary law automatically applies in the domestic order without further legislation of reception⁴⁵². Because of the automatic character of this reception, article 10 has been defined as a “permanent transformer” (*trasformatore permanente*) of customary international law into domestic law⁴⁵³. The constitutional provision at issue also means that the entire Italian legal system, including the Constitution itself, is subordinated to customary international law. Consequently, not only will every domestic norm be constitutionally illegitimate if it contrasts with customary international law, but the latter will also prevail on constitutional provisions themselves. The only exception to this rule concerns the core values underlying the Italian Constitution, which will prevail on contrasting norms of customary international law⁴⁵⁴.

As to conventional international law, normally its reception in the Italian order occurs through an “order of execution” (*ordine di esecuzione*), i.e., through a specific law in which the State expresses its willingness to have a certain treaty or convention applied in the

⁴⁴⁹ Corte Costituzionale, sentenza no. 1 of 14 January 1987.

⁴⁵⁰ *Ibid.*, § 8.

⁴⁵¹ *Id.*

⁴⁵² CONFORTI, B., *Diritto Internazionale*, Editoriale Scientifica, Napoli, Italy, 2006, p. 286.

⁴⁵³ PERASSI, T., ‘La Costituzione Italiana e l’Ordinamento Internazionale’, in *Scritti Giuridici*, Giuffrè, Milano, Italy, 1958, p. 429.

⁴⁵⁴ Conforti, B., *Diritto Internazionale*, cit., p. 288.

domestic order, reproducing its text without any changes⁴⁵⁵. Because this order is normally established as an ordinary law, the common understanding as to the binding force and rank of international conventional law in the Italian order was that this source had the same force as ordinary law and could not therefore prevail on constitutional law. However, important changes in this respect were brought by Constitutional Law n. 3 of 2001, which modified article 117 of the Constitution. Art. 117(1) now states that “legislative powers shall be vested in the State and the Regions in compliance with the Constitution *and with the constraints deriving from EU legislation and international obligations* [emphasis added]”. This provision has indeed established the prevalence of international obligations, including those deriving from treaties, on ordinary law⁴⁵⁶, with the consequence that any ordinary law clashing with international treaties ratified by Italy will be constitutionally illegitimate and may be annulled by the Constitutional Court. Interestingly, this interpretation had already been advanced by the Constitutional Court with specific reference to treaties on the treatment of foreigners⁴⁵⁷. Article 10(2) of the Constitution, indeed, establishes that “[the] legal status of foreigners shall be regulated by law in conformity with international provisions and treaties”. In addition to providing conventional sources on the specific matter of foreigners with a constitutional rank, article 10(2) significantly establishes that the situation of foreigners may not be regulated through administrative acts but rather through law – and that this matter may not be left to the discretion of administrative powers⁴⁵⁸.

Among the international human rights law conventions and treaties ratified by Italy, those most relevant for immigrant women’s right to family life and to employment are the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁵⁹ (under which Italy has also recognised the competence of the related Committee on individual claims against its authorities), the International Covenant on Civil and Political Rights – and its first Optional Protocol⁴⁶⁰ granting the Human Rights Committee with competence on individual complaints – as well as the International Covenant on Economic, Social and Cultural

⁴⁵⁵ *Ibid.*, p. 290.

⁴⁵⁶ *Ibid.*, p. 292.

⁴⁵⁷ *Corte Costituzionale*, sentenza no. 120 of 23 November 1967.

⁴⁵⁸ Bonetti, P., *La Giurisprudenza Costituzionale*, cit., p. 3.

⁴⁵⁹ International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, entered into force on 4 January 1969, UNTS vol. 660, p. 195.

⁴⁶⁰ International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, and Optional Protocol to the International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, UNTS vol. 999, p. 171.

Rights⁴⁶¹ (but not its Optional Protocol assigning competence on individual complaints to the Committee on Economic, Social and Cultural Rights⁴⁶²). Furthermore, Italy has also ratified the Convention for the Elimination of All Forms of Discrimination Against Women⁴⁶³ and its Optional Protocol⁴⁶⁴, consenting to be subjected to the CEDAW Committee's scrutiny on grounds of individual communications and to its enquiries into serious and systematic violations of women's rights eventually occurring on the national territory. Another key source for immigrant women, which has been recently ratified by Italy, is the 2011 ILO Domestic Workers Convention⁴⁶⁵. Italy is also a State Party to the European Social Charter, the European Convention on Human Rights and of course of all the EU Treaties – including the European Charter of Fundamental Rights. In relation to the specific matter of violence against women, Italy was the fifth country to ratify the Istanbul Convention on Violence Against Women⁴⁶⁶ (after Albania, Portugal, Turkey and Montenegro). As with the vast majority of states of immigration, this country is not on the other hand a signatory of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families⁴⁶⁷.

In time, the Constitutional Court has established important principles in relation to both the status of international treaties in the Italian domestic order and most importantly the relationship between the European Convention on Human Rights and the Constitutions as sources of fundamental rights protection, starting from its “twin” judgments no. 348 and 349 of 2007⁴⁶⁸. As to international treaties in general (and therefore also international human rights treaties ratified by Italy), the Court assessed that article 117(1) of the Constitution has

⁴⁶¹ International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966 and entered into force on 3 January 1976, UNTS vol. 993, p. 3.

⁴⁶² Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 and entered into force on 5 May 2013.

⁴⁶³ Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 18 December 1979, entered into force on 3 September 1981, UNTS vol. 1249, p. 13.

⁴⁶⁴ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 6 October 1999 and entered into force on 22 December 2000, UNTS vol. 2131, p. 83.

⁴⁶⁵ Convention Concerning Decent Work for Domestic Workers, cit. Together with Germany, Italy has been so far the only European country to ratify the Convention (see http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO::P11300_INSTRUMENT_ID:2551460, last accessed on 7 July 2014).

⁴⁶⁶ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, cit.

⁴⁶⁷ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990 and entered into force on 1 July 2003, UNTS vol. 2220, p. 3.

⁴⁶⁸ *Corte Costituzionale*, sentenza no. 348 of 22 October 2007 and *Corte Costituzionale*, sentenza no. 349 of 22 October 2007.

not granted these sources with a constitutional rank in the Italian domestic order. While the legislator is under an obligation to respect their provisions and that in case of contrast between an ordinary norm and said international treaties the former will be declared constitutionally illegitimate, the Court also qualified international treaties recalled by article 117 as “interposed norms, (...) themselves subjected (...) to a compatibility control with the provisions of the Constitution”⁴⁶⁹. As to the European Convention on Human Rights, the Constitutional Court stressed its peculiar position in comparison to other international treaties, consisting in its being “more than a simple sum of rights and mutual obligations for States Parties” and in its establishment of “a uniform system of fundamental rights protection”⁴⁷⁰. Such a peculiarity, and the consequent existence of a judicial organ in charge of the interpretation and implementation of the Convention such as the European Court of Human Rights, has also prompted the Constitutional Court to clarify its own role in respect to the Convention’s norms. In particular, the Court has identified its task not only in the assessment of the compatibility of ordinary norms with the ECHR, and thus with article 117(1) of the Constitution, but also, in case of incompatibility, in “ascertaining whether the Convention’s norms themselves, as interpreted by the Strasbourg Court – guarantee a level of protection of fundamental rights at least equivalent to that of the Italian Constitution”⁴⁷¹. The ultimate aim of this scrutiny is to verify the compatibility of specific provisions of the Convention with related constitutional norms, realising “a correct balance between the need to guarantee the respect of international obligations mandated by the Constitution and that of avoiding that this may entail a breach of the Constitution itself”⁴⁷².

The “twin” judgments, however, have not definitively clarified the relationship between supranational human rights norms established by the ECHR and those enshrined in the Italian Constitutional Court. A central problem, for example, concerns the possibility for the Constitutional Court to rely on the Strasbourg Court’s interpretation of certain provisions of the Convention even when this interpretation has been carried out in the context of judgments involving States other than Italy. While the Constitutional Court appears to have given a positive answer to this question,⁴⁷³ this solution has been criticised on the grounds of the

⁴⁶⁹ Corte Costituzionale, sentenza no. 349/2007, cit., § 6.2.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ RANDAZZO, B., ‘Il Giudizio Dinanzi alla Corte Europea dei Diritti: Un Nuovo Processo Costituzionale’, 4 *Rivista dell’Associazione Italiana dei Costituzionalisti* (2011), available at <http://www.associazionedeicostituzionalisti.it/articolorivista/il-giudizio-dinanzi-alla-corte-europea-dei-diritti-un-nuovo-processo-costituzionale> [last accessed on 18 July 2014], p. 36.

observation that it ultimately grants a general, *erga omnes* effect to supranational judgments intended to produce effects only between the involved parties⁴⁷⁴.

As to the reception of the Charter of Fundamental Rights of the European Union in the Italian domestic order, article 11 and the abovementioned article 117(1) of the Constitution constitute key references. On the one hand, art. 11 establishes that “Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations, [and] promotes and encourages international organisations furthering such ends”. Art. 11, indeed, functioned as a legitimising clause of Italy’s accession to the European Union, and of the consequent limitations of sovereignty implied in it⁴⁷⁵.

On the other hand, art. 117 also refers to constraints deriving from EU legislation and therefore may also ground questions of constitutional legitimacy that use the Charter as an interposed norm. Although to this day that Constitutional Court has yet to examine a claim of this sort, it has been rightly argued⁴⁷⁶ that the Court will likely reinstate in this area the principle already established in respect to the European Convention on Human Rights, whereby the constitutionally mandated respect of Italy’s international obligations may not entail a weaker protection of fundamental rights in comparison to that afforded by the Constitution. Furthermore, it is also very significant that in cases where the application of EU law was not at issue, the Constitutional Court has referred to the Charter – together with other international human rights treaties ratified by Italy, including the ECHR – as an interpretative aid with the aim to determine the existence of fundamental rights not explicitly envisaged by the Constitution which may nonetheless be included within the scope of its article 2⁴⁷⁷.

⁴⁷⁴ VARI, F., ‘A (Ben) Cinque Anni dalle Sentenze Gemelle, (Appunti su) Due Problemi Ancora Irrisolti’, 18 *Federalismi.it* (2012), available at [http://federalismi.it/ApplMostraDoc.cfm?Artid=20866&content=A+\(ben\)+cinque+anni+dalle+sentenze+gemelle,++\(appunti+su\)+due+problemi+ancora+irrisolti&content_author=Filippo+Vari#.U8ko7vnUYdd](http://federalismi.it/ApplMostraDoc.cfm?Artid=20866&content=A+(ben)+cinque+anni+dalle+sentenze+gemelle,++(appunti+su)+due+problemi+ancora+irrisolti&content_author=Filippo+Vari#.U8ko7vnUYdd) [last accessed on 18 July 2014], p. 4 ff

⁴⁷⁵ Conforti, B., *Diritto Internazionale*, cit., p. 301. See also *Corte Costituzionale*, sentenza no. 183 of 18 December 1973.

⁴⁷⁶ LAMARQUE, E., ‘L’Interpretazione Conforme al Diritto dell’Unione Europea Secondo la Corte Costituzionale Italiana’, paper presented at *L’Interpretazione Conforme al Diritto UE: Profili e Limiti di un Vincolo Problematico* (Rovigo, 15- 16 May 2014), available at <http://www.giurcost.org/studi/lamarque3.pdf> [last accessed on 18 July 2014], p. 12.

⁴⁷⁷ *Ibid.*, pp. 12-13. See also *Corte Costituzionale*, ordinanza no. 138 of 23 March 2010, § 10 of Legal Grounds, and *Corte Costituzionale*, sentenza no. 31 of 15 February 2012, § 3 of Legal Grounds.

2. Immigrant Women's Fundamental Right to Family Life: Problematic Provisions of Italian Law

Having outlined the regulatory regime applicable to immigrant women in Italy and the Italian fundamental rights framework, I will now turn to examine the interaction between these two systems in relevant cases concerning immigrant women's family life. In order to do so, in each section I will analyse more closely specific aspects of Italian law which disproportionately and negatively affect immigrant women's enjoyment of family life, and I will then turn to discuss relevant judgments by Italian courts in order to understand whether and to what extent the fundamental rights framework enforced in the domestic order has been able to correct such shortcomings.

This type of analysis will be conducted with respect to three main topics: possibility to sponsor of family reunification, access to residence rights on the grounds of pregnancy and early maternity as well as protection against domestic violence. The first and the third matter have been chosen because of the availability of significant examples of worthy judicial reasoning by Italian courts on the effects of national norms on immigrant women specifically in the light of their fundamental rights. Access to residence rights during pregnancy and maternity has been selected because at least two interesting judgments by the Constitutional Court have discussed the scope and limitations of this right in the light of constitutional principles, with meaningful results.

It must be noted at the outset that the vast majority of the normative problems that will be highlighted in this section can be connected to the wide discretionary power left by European Union law to Member States in the field of immigration. The majority of the problematic provisions of domestic law that will be critically analysed in this section, indeed, have been adopted in order to receive EU immigration law. In chapter 2, I criticised the wide margin of appreciation left to Member States in particularly crucial fields for immigrant women. I observed how by failing to provide minimum standards in these sensitive areas, EU law allowed for the adoption of national immigration regimes producing a disparate impact on immigrant women's rights in the field of family life and employment. In this section, I will also discuss some tangible examples from Italian law that have in fact realised such a risk. On the other hand, I will question whether the Italian system of fundamental rights has been able to correct the perverse effects of these norms on immigrant women in a more effective and

consistent way than what has so far been realised by the European Court of Justice's jurisprudence.

a. Access to Family Reunification Versus Income Requirements Imposed by Italian Law in the Light of Migrant Women's Constitutional Rights

Art. 29 of the *T.U.* regulates access to family reunification for third-country nationals. According to its paragraph 1, family members admitted to reunification include the “spouse not legally separated and above the age of eighteen”, as well as minor unmarried children even if only of the spouse and if born out of wedlock (provided that the other parent consents), adult dependent children who are completely unable of providing for themselves for health reasons and dependent parents who don't have other children in the country of origin or are over the age of sixty-five whose other children are incapable of supporting them due to serious health reasons. As for the requisites imposed by this norm, art. 29(3) requires that the sponsor shows availability of housing in compliance with “health and sanitary requisites” as well as certified living suitability, of healthcare insurance in case of reunification with parents over sixty-five and most importantly of a “minimum yearly income deriving from legal sources and not inferior to the yearly amount of the welfare cheque plus half of this sum for each family member for which reunification is pursued”. Income requirements are raised to double of the welfare cheque when family reunification is pursued for two or more children below the age of fourteen or for two or more family members entitled to subsidiary protection.

I have repeatedly stressed how for immigrant women pursuing to sponsor family reunification income requirements may be disproportionately difficult to satisfy due to several factors including lower pay, low labour market participation, their concentration in the worst sectors of the labour market, and so. In the Italian context, it is particularly interesting to focus on the specific problem of the possibility for immigrant women to access family reunification – and thus to their fundamental right to family life – on the grounds of care and reproductive work rather than productive work. In this respect, a first hint of the openness of the Italian system to this possibility is provided by art. 29(3)(b) of the *T.U.*, which clarified that “for the purpose of determining income the total yearly income of the family members living together with the person applying for family reunification must also be taken into consideration”. This provision is particularly important for immigrant women, who are more likely than their male counterparts to be devoted to reproductive and care work within the

family and who may therefore disproportionately benefit from norms allowing them to sponsor family reunification by relying on the total income of their families. While this provision suggests that the Italian rules on family reunification –at least in relation to income requirements – may live up to immigrant women’s fundamental right to family life as enshrined in the Italian Constitution, one may argue that it would be far-fetched to affirm on this sole basis that the Italian fundamental rights framework demands to take immigrant women’s reproductive or care work into consideration as a ground to sponsor family reunification. In particular, the norm at issue may also be interpreted as requiring sponsors to perform paid employment in any case, and as including the income of other family members in a merely cumulative sense. If that is the case, the capability of art.29(3)(b) to ensure access to family reunification for sponsors devoted entirely to reproductive and care work would be severely undermined.

A crucial response to these doubts has been provided by Italian Courts, which have established extremely important principles in this field with specific respect to unemployed third-country national immigrant women pursuing to sponsor family reunification with their children. Two main cases are particularly significant for the purposes of this section.

Firstly, in 1995 the Italian Constitutional Court⁴⁷⁸ was submitted with the case of a Brazilian woman whose application for family reunification with her son had been rejected on the grounds of the fact that, “being a homemaker, she did not carry out any employed activity”⁴⁷⁹. The applicable norms at the time indeed granted the right to family reunification to “third-country national workers”. Interestingly, the Constitutional Court assessed that the correct interpretation of this norm necessarily had to go beyond the literal text and consider the right to family reunification as also attributed to homemakers. Two main constitutional rights demanded so.

On the one hand, the Court considered that despite the fact that the norms at issue were aimed at protecting third-country national workers, the specific provision on family reunification had “an autonomous relevance” because “it [protected] rights such as those of the family and particularly of minors – which are guaranteed by the Constitution and recognised by multiple international sources (first of all by the 1948 Universal Declaration of Human Rights)”⁴⁸⁰. Therefore, this norm protected “a need – that of a family living together –

⁴⁷⁸ *Corte Costituzionale, sentenza* no. 28 of 12 January 1995.

⁴⁷⁹ *Ibid.*, § 1 of Legal Grounds.

⁴⁸⁰ *Ibid.*, § 4 of Legal Grounds.

which has its roots in the constitutional norms which ensure protection to the family and in particular, in its context, to minor children”⁴⁸¹. The fundamental right to family life as emerging from articles 29 and 30 of the Constitution had to be recognised to third-country nationals too, because “the right and the duty to raise and educate one’s children, and thus of living with them, and the right of parents and children to a common life based on family unity are (...) fundamental rights of the human being”⁴⁸². While these rights could be balanced with other constitutional values, this balance was already realised by imposing the prerequisite of being able to support one’s family members when pursuing family reunification with them. Thus, the Court assessed that the fundamental right to family life as emerging from articles 29 and 30 of the Constitution demanded an interpretation of the norm at issue as ensuring access to family reunification as sponsors not only to workers but also to “those who carry out domestic work”⁴⁸³.

On the other hand, and even more significantly, the Court was not content with identifying the constitutional right to family life as a ground for the described interpretation of the norm at issue. Despite the fact that this aspect had not been raised by the referring court, the Court included article 35 of the Constitution in the fundamental rights demanding the inclusion of homemakers in the possibility to sponsor family reunification. In this respect, the Court noted that the state obligation to “protect work in all its forms and practices” established by article 35 did not merely refer to productive work but also included unpaid reproductive and care work within the family. Indeed, “also the work performed within the family, due to its social and economic value, can be included, notwithstanding its peculiarities, under the protection of article 35 of the Constitution to all forms of work”, because “it is a kind of working activity which has already been recognised as of social and economic value, also because of the undeniable benefits which the entire community draws from it and at the same time of the burdens and responsibilities which derive from it and which even at present time almost exclusively weigh on women (also due to widespread phenomena of unemployment)”⁴⁸⁴. On the grounds of this evaluation of reproductive and care work as actual work, the Court concluded that “the importance of working activities within the family must generate the consequence that this activity is assimilated to forms of employment which the law at issue requires to access family reunification”⁴⁸⁵ and therefore the applicant woman had to be

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

considered as a worker entitled to the right to family reunification with their children. The judgment at issue is extremely significant not only for its accurate characterisation of unpaid care and reproductive work as “proper work” but also and especially for its analysis of a biased norm of family migration law in the light of the fundamental rights to family life and to employment. By imposing an interpretation of this norm on the grounds of constitutional rights protecting not only family life and minors but also employment, the Court was able to address a perverse gendered effect of a provision of national immigration law and correct it.

The importance of this judgment is not undermined by the fact that it concerned a legislation no longer in force. After the *Testo Unico* currently in force had already been adopted, a more recent decision by the Bologna Court⁴⁸⁶ indeed used this judgment as a reference to assess a similar case concerning a third-country national woman whose application for family reunification had been rejected on the grounds that she had no income. As observed by the Court, the applicant in this case was herself residing in Italy together with her son and his family on the grounds of a residence permit for family reunification, which allowed her to work. However, she had chosen to “contribute within the family, where young children are present, [which] had allowed her to integrate more in her new environment while maintaining her traditional role”⁴⁸⁷. On the specific grounds of the principles established by the Constitutional Court almost ten years earlier, the Bologna Court observed that “it was unreasonable [for the authorities] to choose restrictive interpretations which contrast with constitutional principles”, that said principles “arguably include both the protection of family unity (arts. 29 and 30 of the Constitution) and the protection of women’s work within the family pursuant article 35 of the Constitution” and that “it would appear to be constitutionally illegitimate to allow family reunification with children to the foreign woman who works outside of the home and to deny it to the foreign woman who carries out her homemaker activity, with the logistic and material support of entire families”⁴⁸⁸. On these grounds, the Court annulled the rejection of the mother’s application for family reunification with her son declaring it illegitimate⁴⁸⁹.

⁴⁸⁶ *Tribunale di Bologna, ordinanza* of 14 November 2002.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.*

⁴⁸⁹ Incidentally, the same principles explored in this section have even more recently inspired judgments by the *Consiglio di Stato* upholding immigrant women’s oppositions against the rejection of their citizenship applications on grounds of lack of independent income⁴⁸⁹. In these judgments the *Consiglio* condemned the authorities’ denial of citizenship as illegitimate because of their failure to recognise the unpaid care and

In the examined judicial examples, immigrant women's fundamental rights as recognised by the Italian order played an extremely powerful and positive role in ensuring their access to family reunification in conditions of equality not only with men but also with working women. Indeed, the recalled fundamental rights supported a gender-sensitive interpretation of legal rules on family reunification less focused on paid, reproductive work and on an underlying breadwinner model, as well as a recognition of the same dignity and value to productive and reproductive or care work when material support to the family member can be ensured in other ways which do not weigh on the national finances. Therefore, these fundamental-rights based judicial discourses prompted the establishment of extremely important guidelines for an interpretation of art. 29(3)(b) of the *T.U.* as also allowing immigrant women performing unpaid care work within the household to sponsor family reunification.

b. Protection during Pregnancy and Maternity: Special Permits “for Medical Reasons” in the Light of Migrant Women’s Constitutional Right to Family Life

The Italian legal framework applicable to third-country national women grants them with a special protection during pregnancy regardless of the regularity of their stay. Article 19(2)(d) of the *T.U.* prohibits the expulsion of “women during pregnancy or in the first six months after giving birth”. In connection to this, art. 28(1)(c) of Presidential Decree n. 394 of 1999 establishes that in this case women will be granted with a special residence permit “for medical reasons” (*per cure mediche*) after they have presented a medical certificate confirming their condition. Regardless of whether they hold this permit or not, third-country national women are in any case recognised by art. 35(3)(a) of the *T.U.* with a right to obtain urgent or essential healthcare connected with “the social protection of pregnancy and maternity”, in conditions of equality of treatment with Italian women.

The main limitation of this permit lies in its exceptional character. The cited sources do not speak of a more or less stable right to stay enshrined in a residence permit on the grounds of pregnancy and maternity, but rather simply prohibit expulsion of third-country national women during pregnancy and the first six months after giving birth. The limited duration of

reproductive work of the applicant women as a proper job in the light of article 35 of the Constitution (which considered that these women were part of families where other members were devoted to productive work).

the permit, as well as its characterisation as a permit for “medical care”, casts several doubts as to the rights connected to this permit. Important questions concern the extent of the protection granted by this permit to third-country national women during pregnancy or after giving birth, as well as to which perspectives may open up for holders of this permit beyond its temporary validity. Arguably, immigrant women may have very few interests in actively pursuing said permits if the only result for them would be a postponement of their expulsion as a consequence of self-reporting their irregular stay to the authorities. If that were the case, the residence permit “for medical care” would generate hardly any protective effects for this category.

Against this background, two main issues were faced by Italian courts in the light of immigrant women’s fundamental rights. Both concern crucial aspects of this category’s possibility to effectively enjoy residence rights through the special residence permit for pregnancy reasons. The first matter relates to the possibility for husbands and partners to also obtain these permits, in order to be authorised to reside in Italy together with their wife or partner for the duration of her pregnancy and during the early months of maternity. The second issue concerns immigrant women’s access to more stable residence permits after the expiration of their special permit for pregnancy or maternity, so as to consolidate the emergence from their irregular status obtained through the latter.

As to the possibility to extend residence permits for medical care to the holders’ partners, in 2000, the Constitutional Court first ruled on this matter⁴⁹⁰, establishing that immigrants’ fundamental right to family life demanded the extension of the residence permit for medical care held by a pregnant Albanian woman to her husband who lived with her in Italy but did not hold a residence permit. In order to reach this conclusion, the Court relied on migrants’ fundamental right to family unity as enshrined in articles 29 and 30 of the Constitution. In particular, it recalled its previous judgment no. 28/1995, whereby the parents’ right to raise and educate children and thus to live with them enjoying family unity, as fundamental rights of every human beings, must also be recognised to foreigners. In addition to the Constitution, the Court importantly identified several international human rights sources recognising migrants’ fundamental right to family unity. The Court indeed referred to “provisions of international treaties ratified by Italy, among which: those enshrined in articles 8 and 12 of the European Convention on Human Rights (...), article 10 of the International Covenant on Civil

⁴⁹⁰ *Corte Costituzionale, sentenza no. 376 of 12 July 2000.*

and Political Rights of 1966 (...), [and] articles 9 and 10 of the New York Convention of 20 November 1989 on the Rights of the Child”⁴⁹¹. On these grounds, the Court concluded that “from the entirety of these norms, despite the variety of their formulation, it emerges a principle which is fully recognisable in articles 29 and 30 of the Constitution whereby the widest protection and support must be guaranteed to the family”⁴⁹² and that “this protection and support must be granted regardless of whether parents are citizens or foreigners, because they involve fundamental human rights which can only be limited in presence of specific and justified needs of protecting the very rules of democratic coexistence”⁴⁹³.

These state obligations to protect the family, in the Court’s view, clashed with the restriction of the granting of residence permits for medical care only to pregnant women or to women having just given birth also for specific gendered reasons. Indeed, the Court observed that “the norm tragically forces foreign women residing in Italy to choose between following expelled husbands abroad and facing childbirth and the first months of their child without their husbands’ support”⁴⁹⁴. Most importantly, the Court observed that the constitutional right of parents to raise and educate children does not distinguish between female and male roles within the family but is rather based on “a mutual integration between them”. In the light of these considerations, the Court declared art. 19(2)(d) of the *T.U.* in breach of the Constitution because it did not extend the prohibition of expulsion to husbands.

Arguably, the examined judgment constitutes another significant example not only of the strength of fundamental rights *vis-à-vis* restrictive norms of immigration law and of their positive impact on immigrants’ enjoyment of family life in the host country, but also of the Court’s capability to adopt a gender-sensitive perspective while examining immigration law through these fundamental rights standards. It appears very clearly, indeed, that admitting husbands to the same residence rights recognised to immigrant women during pregnancy and early maternity constitutes an important development for the latter as well. As a result, immigrant women are much more likely to enjoy an effective and not illusory protection on the grounds of their special permits by not having to suffer enforced ruptures of their family unity in order to enjoy residence rights. Moreover, it has been shown that immigrant women during pregnancy suffer from significantly higher levels of anxiety than Italian women,

⁴⁹¹ *Ibid.*, § 6 of Legal Grounds.

⁴⁹² *Id.*

⁴⁹³ *Id.*

⁴⁹⁴ *Ibid.*, § 7 of Legal Grounds.

especially when they lack the support of social networks and feel that they cannot rely on their partners⁴⁹⁵.

Furthermore, I would argue that a particularly interesting aspect of this case lies in the fact that the reason for the extension of the residence permit at issue to husbands was understood by the Constitutional Court itself as demanded by the fundamental principle of equality between sexes (recalled by the remitting judge, who also relied on article 3 of the Constitution) and of the essential character of the father's presence during pregnancy and early maternity (also discussed in the light of the equal duty and right of both parents to care for and raise their children). In sum, it appears from this judgment that an entire system of fundamental and human rights pushed towards the change of a norm of national immigration law in order to realise a more effective protection of immigrant women during pregnancy and early maternity, as well as of their right to equality within the family as to the distribution of childcare burdens.

All of these important developments, however, suffer from a significant limitation. In 2006, the Constitutional Court established that the Italian Constitution recognises a fundamental right to family unity only on the grounds of marriage. The referring Court in this case had requested the Constitutional Court to determine whether the fundamental right to family life also demanded the extension of residence permits for care reasons to unmarried partners of third-country national women. In this respect, the referring court rightly observed that the international human rights law sources cited by the Court in its 2000 judgment⁴⁹⁶ recognise the fundamental right to family life regardless of whether a family is founded on marriage. According to the referring court, art. 19(2)(d) of the *T.U.*, by not extending the permit for medical care to unmarried partners, violated article 2 and 30 of the Constitution because it prevented “the enjoyment of the fundamental right to raise and educate children, even if born out of wedlock”⁴⁹⁷, as well as articles 31 and 32 of the Constitution – the latter because it constrained “the absolute obligation of solidarity connected to the protection of the right to health”⁴⁹⁸. The Constitutional Court, however, rejected this view. It argued that that the extension of the suspension of expulsion to husbands “presumes a certainty of family relationships that cannot be found (...) in the case of a *de facto* relationship which, as such,

⁴⁹⁵ BOARETTO, M., *Ansia Prenatale nelle Donne Immigrate: Complicanze in Gravidanza, al Parto e Neonatali*, Ph.D. Thesis, Department of Neuroscience, Università degli Studi di Padova, 2010.

⁴⁹⁶ *Corte Costituzionale*, ordinanza no. 444 of 6 December 2006.

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

cannot but be affirmed by the involved persons”⁴⁹⁹ and that “art. 31 of the Constitution is aimed at safeguarding the family as a natural society founded on marriage and cannot, therefore, be invoked with respect to a situation such as that submitted by the referring court”⁵⁰⁰.

The limitation provided by the Court in this judgment is in my view regretful. By creating a gap between international human rights law and the Italian fundamental rights system in relation to the degree of protection ensured to immigrant women’s enjoyment of family unity, it interrupted a synergy that had worked very well in its previous judgment of 2000 – both in terms of the effective protection ensured and in terms of encouraging a gender-sensitive enforcement of national provisions of immigration law. Furthermore, with this judgment the Court discouraged the further expansion of the principles established in its 2000 judgment – which had for instance been carried out in a 2004 judgment by the Turin Court⁵⁰¹. In the latter case, indeed, the Turin Court had assessed that “a constitutionally oriented reading of article 19 demands the extension of the prohibition of expulsion is extended to the partner living with together with the pregnant woman as if married to her”⁵⁰² also because the “status of parents is exclusively determined by filiation and not by marriage”⁵⁰³.

Moving on to the second issue faced by Italian Courts, this concerned the possibility to convert residence permits for medical care into other, more stable, residence permits. In this respect, it must be noted that both in judgment 376/2000 and in decision 444/2006 the Constitutional Court referred to the suspension of the expulsion underlying the granting of this permit as “temporary”. Subsequently, a Circular by the Ministry of Interior clarified in 2009⁵⁰⁴ that residence permits for medical care can be converted in more stable residence permits for family reasons – provided of course that the holder of the permit satisfies the requirements for the latter.

This clarification was much needed, especially because the fundamental rights system in force in the Italian order had proved unable to foster a similar interpretation in judicial contexts in a stable manner. In this respect, we may observe for instance that the Court of

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Tribunale di Torino, ordinanza* of 10 March 2004.

⁵⁰² *Id.* The expression used in the judgment’s original language was *convivente more uxorio*, which indicates a situation whereby two persons in a relationship cohabit as husband and wife but are not married.

⁵⁰³ *Id.*

⁵⁰⁴ *Circolare del Ministero dell’Interno* no. 664 of 5 February 2009, *Conversione del Permesso di Soggiorno per Cure Mediche in Motivi Familiari*.

Vicenza produced two contrasting interpretations on this matter, despite the fact that both were heavily influenced by fundamental rights. Interestingly, in a first decision⁵⁰⁵ the Court assessed the case of the husband who had already been involved in the Constitutional Court's judgment 376/2000. After being granted with a temporary permit for medical care by the latter judgment, the husband argued before the Vicenza Court that he could convert this permit into a permit for family reasons. It is extremely significant that the Vicenza Court applied the reasoning of the Constitutional Court to the contemporary situation of the involved immigrant couple. In this context, it stated that the principles affirmed by the latter could also be applied to the granting of a residence permit for family reasons since they had involved their access to the fundamental right to family unity as protected by the Constitution and by international human rights law. Thus, the Vicenza Court observed that the upholding of the applicant's claim was supported by the fact that in case of expulsion of the husband, the wife would have to choose "whether to abandon Italy, where she regularly lives and resides, renouncing opportunities of social and economic advancement also linked to better life opportunities for the minor, to follow her husband in the country of origin in order to maintain family unity"⁵⁰⁶.

In a subsequent decision⁵⁰⁷, on the other hand, the Vicenza Court rejected the application of a Nigerian woman opposing the national authorities' refusal to convert her permit for medical care into a permit for family reasons despite the fact that she lived together with her children and her husband in Italy and the latter held a residence permit for work reasons. The applicant argued that this decision breached her fundamental right to family unity under constitutional law and international human rights law. The Court, however, held that the fundamental right to family unity of the applicant had to be balanced "with other values of equal constitutional rank" and observed that allowing to convert the permit for medical care in a more stable permit "would turn an exceptional and temporary remedy (...) into a tool to circumvent the national rules on the entry and stay on the national territory, that is, to access family reunification without observing the procedural and substantial preconditions which (...) substantiate the legitimate exercise of the right to family unity" under the *T.U.* Therefore, the Court's preoccupation with avoiding the encouragement of illegal entry "with the expectation/hope to regularise one's stay in the future" through pregnancy and maternity

⁵⁰⁵ *Tribunale di Vicenza, ordinanza* of 6 May 2002.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Tribunale di Vicenza, decreto* of 10 January 2008.

prevailed over the need to ensure the enjoyment of the applicant's right to family unity which had been protected in its previous decision.

The lack of incisiveness of fundamental rights in the examined judicial context made the subsequent clarification by the Ministry of Interior utterly necessary in the view of ensuring that immigrant women could effectively benefit from special permits on the grounds of pregnancy and early maternity. Arguably, the possibility to convert them into more stable residence and work permits actually makes their granting a positive result for immigrant women in these situations, who are allowed to effectively emerge from their irregular status rather than merely obtain a postponement of their expulsion⁵⁰⁸. Consequently, immigrant women are much more incentivised to request permits "for medical reasons".

The case law analysed in this section suggests that in the field of permits for medical care the fundamental rights system in force in Italy created mixed results. It is however interesting to note that when the fundamental right to family unity did prevail in this balance, it fostered gender-sensitive observations by Italian courts on the involved immigrant women's condition. In particular, both the Constitutional Court in its judgment no. 376/2000 and the Court of Vicenza in its 2002 decision, when discussing the husbands' right to stay in Italy, were careful to consider the impact of the husbands' eventual expulsion for the involved women. What is more, the Court of Vicenza did so with reference not only to the impact on the migrant woman's family life but also on her "opportunities for economic and social upward mobility connected to the development of her economic activity"⁵⁰⁹ – that is, with an appreciable consideration of both productive and reproductive work carried out by the mother in the case at issue. On a more general level, the extension of permits for medical care to fathers also in the light of the constitutional principle of equal distribution of parental rights and duties between men and women enshrined in article 30, although limited by the Court to married couples, arguably produced important effects on immigrant women's right to equality within the family.

⁵⁰⁸ Although the intensity of its effects depends on personal experiences and circumstances, irregular residence undoubtedly constitutes a source of vulnerability and disadvantage for immigrant women, particularly during pregnancy and early maternity. For instance, irregular status negatively affects immigrant women's reproductive health because this group cannot access all the services offered by the Italian National Health Service (CATALDO, C., GERACI, S., SISTO, M. R., 'Bambini Immigrati: Tutela Legale e Politiche Socio-Sanitarie', 30 *Medico e Bambino* (2011) 306, available at http://www.medicoebambino.com/?id=1105_306.pdf – last accessed on 8 March 2014). For a broader review of the European context, see WOODWARD, A., HOWARD, N., WOLFFERS, I., 'Health and Access to Care for Undocumented Migrants Living in the European Union: a Scoping Review', *Health Policy and Planning*, Advance Access published August 16, 2013, doi: 10.1093/heapol/czt061.

⁵⁰⁹ *Tribunale di Vicenza, ordinanza* of 6 May 2002, cit.

c. Immigrant Women's Freedom from Domestic Violence: Influence of Fundamental Rights on Italian Courts

The Italian Criminal Code prohibits domestic violence and abuse by article 572, punishing “abuse against family members and cohabiting persons” (*maltrattamenti contro familiari e conviventi*) with detention from two to six years. More severe detention measures are established in case the abuse causes a serious personal injury or an extremely serious injury. If the abuse causes the death of the victim, detention can be imposed for up to twenty-four years. In order to make this protection more effective, in 2001⁵¹⁰ article 291 of the Criminal Code of Procedure⁵¹¹ was amended so that it would allow public prosecutors, in case of urgency and necessity, to request judges to order that accused persons immediately leave the household and to prevent them to access it again without the judge's authorisation.

Italian immigration law, on its part, offers different levels of protection. In the context of family migration, the intensity of such a protection depends on the nationality of the sponsor. Article 12(3) of d.lgs. 30/2007, applicable to third-country national family members of Union citizens, includes domestic violence among the cases where third-country national family members who have not yet acquired a permanent residence right⁵¹² are allowed to maintain their permit for family reasons in case of divorce or annulment of marriage. In particular, art. 12(2)(c) grants this possibility to “injured parties in a criminal proceeding, still pending or concluded with a conviction, for offences against the individual committed in the family environment”. In addition to limiting the described protection to cases where victims of domestic violence have initiated proceedings against their abusive family member and have finalised a divorce (separation apparently being insufficient), this provision is affected by a further shortcoming. Pursuant article 12(4), in any case the third-country national family member will have to provide proof of being employed or self-employed, “so that they do not become a burden for the national social assistance system during their stay”, as well as of having health insurance, or of being part of the family of a person who already satisfies such conditions in Italy. On a broader level, d.lgs. 30/2007 does not mention cohabitation as a

⁵¹⁰ Legge no. 154 of 4 April 2011, G.U. no. 98 of 28 April 2001.

⁵¹¹ Codice di Procedura Penale, D.P.R. no. 447 of 22 September 1988.

⁵¹² Pursuant art. 14 of d.lgs. 30/2007, a permanent right of residence is acquired by family members after five years of continuous residence on the national territory together with the Union citizen.

specific condition that third-country national family members need to satisfy nor as a precondition for maintaining residence permits for family reasons.

On the other hand, article 30 of the *T.U.* does not offer similar guarantees to family members of third-country national sponsors. In addition to failing to mention domestic violence as a specific ground of legal protection for holders of residence permits for family reasons, article 30 also establishes a problematic link between cohabitation and the maintenance of said residence permits. Indeed, pursuant art. 30(1-*bis*), residence permits for family reasons granted to foreign spouses of Italian, Union, or third-country citizens “will be immediately revoked if it is ascertained that an actual cohabitation did not follow the marriage, except when children were born from the marriage”. This provision applies in particular to third-country nationals already residing in Italy for at least one year who subsequently marry an Italian or Union citizen or a regularly staying third-country national. Arguably, this measure responds to the implicit aim of deterring sham marriages contracted with the sole aim of obtaining residence permits. It is however unclear why only third-country nationals already residing in Italy are included within the scope of this indirect “cohabitation requirement”, whereas art. 30(1-*bis*) directly establishes that permits for family reasons granted at first entry in Italy will not be granted nor renewed and will be revoked “if it is ascertained that the marriage (...) [has] taken place only in order to allow the interested person to reside on the national territory”.

In addition to the described provision concerning the protection of immigrant women holding residence permits for family reasons, it should be noted that the *T.U.* also envisages the possibility to access special residence permits on the grounds of being victims of violence. Until August 2013, the protections against domestic violence established by the *T.U.* were utterly inadequate and presented serious limitations. In particular, until that date the only available tool for victims of violence consisted in the special permit “for humanitarian reasons”, pursuant art. 18 of the *T.U.* According to this provision, such a permit can be granted to foreign victims of “violence or of serious exploitation”. However, art. 18 also established that the violence or abuse must be accompanied by “tangible risks for one’s physical integrity, due to efforts to subtract oneself from the influence of a criminal organisation (...) or of declarations made in the context of preliminary investigations or of proceedings”. Therefore, according to a literal interpretation of art. 18, immigrant women subjected to domestic violence by individuals rather than by criminal organisation could not be included in its protective scope.

This regrettable situation was changed by law n. 119/2013⁵¹³, which introduced the possibility for victims of domestic violence to obtain a special residence permit “for humanitarian reasons”. Before moving on to discuss the regulation of such a permit, it should be stressed that law n. 119/2013 provides an important example of the influence of fundamental and human rights on the legal treatment of immigrant women in Italy at normative level. Such a law, indeed, was adopted in the aftermath of the ratification of the Istanbul Convention by Italy⁵¹⁴ and was the result of a lively debate in Italian politics and society⁵¹⁵. Although the law was ostensibly aimed at reforming Italian law so as to ensure its compliance with the Istanbul Convention, it mainly affected domestic criminal law, which was only one of the many sectors involved by the Convention. It is in any case very significant that the objective of receiving the human and fundamental rights recognised in the Convention was also pursued through the introduction of a special permit for immigrant women victims of domestic violence. In this respect, it appears that art. 59 of the Convention was the specific provision inspiring the reform. According to art. 59(1) and (2), State Parties have an obligation to ensure that victims of violence against women⁵¹⁶ whose residence permit is dependent on that of their spouses or partners are allowed to access an autonomous residence permit in case of dissolution of the marriage or the relationship, and that eventual expulsion proceedings initiated against them shall be suspended in order to allow them to apply for such a permit. Furthermore, art. 59(3) envisages a broader state obligation to issue renewable residence permits to victims whenever it is established that their stay “is necessary owing to their personal situation” and/or for the purpose of their cooperation in an investigation or criminal proceedings.

Thus, a new article (18-*bis*) was added in the *T.U.* by law 119/2013. Art. 18-*bis* refers to situations of abuse and violence against foreigners ascertained in the context of investigations or proceedings concerning certain criminal offences committed in the context of domestic

⁵¹³ *Legge* no. 119 of 15 October 2013, *G.U.* no. 242 of 15 October 2013, which converted law decree no. 93 of 14 August 2013 into law.

⁵¹⁴ The Istanbul Convention was ratified and received in the Italian domestic order with *legge* no. 77 of 27 June 2013 (*G.U.* no. 152 of 1 July 2013).

⁵¹⁵ For a thorough account of this debate and of Italian feminists’ contribution to it, see PERONI, C., *Violenza di Genere e Neofemminismi: Discorsi e Pratiche*, Ph.D. Thesis, Department of Ecclesiastical, Philosophical-Sociological and Criminal Legal Sciences, University of Milan, 2012, especially p. 39 ff.

⁵¹⁶ Art. 3(a) of the Convention defines violence against women as “a violation of human rights and a form of discrimination against women”, and includes in this definition “all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”. Domestic violence is defined by art. 3(b) as encompassing “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”.

violence⁵¹⁷, or within the activities of anti-violence centres, local social services or specialised social services for victims of violence. Like art. 18, art. 18-*bis* also requires the presence of a concrete and present danger for the physical integrity of the involved foreigner, as a consequence of declarations made by the victims during preliminary investigations or trials, or as a consequence of their choice to subtract themselves from the suffered violence. When such preconditions are satisfied, after having obtained a judicial opinion, Italian police authorities shall grant victims of domestic violence with a special residence permit for humanitarian reasons in order to “be allowed to subtract themselves from the violence” (art. 18-*bis*, paragraph 1). Importantly, art. 18-*bis*(4) establishes that this permit will be revoked “in case of conduct incompatible with its scope”, without offering further specifications as to what may constitute incompatible behaviour. It is safe to assume that resuming cohabitation with the perpetrator of domestic violence may be considered as an example of incompatible behaviour, but the generic character of this expression may also give leeway to more questionable interpretations. Some recent examples of questionable judicial assessments of cases of violence against women command a specific attention to this problem, in the view of avoiding that immigrant women holding the permits at issue would be deprived from them on the basis of stereotypical assumptions as to what constitutes “proper” or “normal” behaviour for victims of domestic violence⁵¹⁸. Therefore, it will be crucial to observe how Italian courts

⁵¹⁷ Such criminal offences include abuse against family members and cohabiting persons (art. 572 of the Criminal Code), bodily harm (arts. 582 and 583), female genital mutilation (art. 583-*bis*), deprivation of personal liberty (art. 605), sexual violence (art. 609-*bis*), stalking (art. 612-*bis*), as well as all offences for which art. 380 of the Code of Criminal Procedure establishes an obligation to immediately arrest perpetrators caught in the act. In addition to stalking, sexual violence and abuse against family members, the latter also include (but are not limited to) reduction to slavery (art. 600 of the Criminal Code), and child prostitution (art. 600-*bis*). It should be stressed that pursuant art. 18-*bis*(1), for the purpose of the application of this provision, domestic violence is understood as “one or more acts, serious or non-episodic, of physical, sexual, psychological or economic violence that occur within the family or the family unit or between persons who are or have been linked by marriage or a romantic relationship, regardless of the fact that the perpetrator of these acts shares or has shared a home with the victim”. As it is possible to observe, the definition adopted by art. 18-*bis* is basically identical to the one provided by the Istanbul Convention (with the sole difference of the Italian norm’s reference to serious or non-episodic acts).

⁵¹⁸ Italian jurisprudence has offered multiple examples of what in my view constitute a deeply inappropriate assessment of cases concerning violence against women. The questionable character of such judicial assessments is strictly linked to stereotypical views concerning the involved victims. This phenomenon is particularly worrying because the *Corte di Cassazione* itself is not immune from it. In 2006, and more recently in 2013, for instance, the Court has examined the possibility for perpetrators of sexual violence against minors to benefit from the extenuating circumstance consisting in the lesser seriousness of the offence (art. 609-*bis*). In this context, it applied severely gendered criteria to the involved victims. In its judgment no. 6329/2006, the Court quashed a previous judgment that had denied the extenuating circumstance on the grounds of the damage caused to the victim’s sexual sphere. The Court’s motivation was that the victim did not suffer such a damage because, despite being only fourteen years old, she “has already had many sexual encounters from the age of thirteen, with men of any age” and thus at the moment of the abuse (qualified as an “encounter” by the Court) “her personality was much more developed

will interpret art. 18-*bis* – and whether or not fundamental rights may support a non-stereotypical and balanced assessment of cases concerning special permits for domestic violence. Unfortunately, due to the recent character of the reform at issue, this analysis is not yet possible.

Against this background, I would argue the Italian system of protection of immigrant women against domestic violence has significantly improved thanks to the recent ratification of the Istanbul Convention – and of the great influence of the human and fundamental rights proclaimed by this source on recent legislative reforms of Italian immigration law.

However, I shall stress that even after such reforms the Italian family migration regime presents some critical aspects in relation to immigrant women's freedom from domestic violence. In particular, two main problematic areas can be identified. Firstly, the provision whereby residence permits for family reasons will be immediately revoked in absence of cohabitation poses serious problems of coordination with the general legislation on residence permits for domestic violence. It is indeed reasonable to imagine that an interruption of

from a sexual point of view than what may normally be expected from a girl of her age" (*Corte di Cassazione Penale, sezione III, sentenza* no. 6329 of 20 January 2006). Furthermore, and in my view even more questionably, the Court recently qualified as "less serious" a sexual violence committed against a child under fourteen (an age under which Italian law automatically assumes lack of consent) because "the sexual act had been committed within a love affair". Therefore, "despite the fact that sexual abuse is always characterised by a serious physical invasion, in this specific case it cannot be qualified as equally invasive as when it occurs with force and violence and outside of a love affair" (*Corte di Cassazione Penale, sezione III, sentenza* no. 45179 of 8 November 2013). In sum, by examining a case of sexual violence through a "romantic" lens, the Court shifted the focus of its analysis from the perpetrator to the victim, and explicitly discussed "consent" in quotation marks – as if to suggest that despite the existence of an absolute presumption in Italian criminal law whereby children under fourteen cannot consent to sexual relations, that particular child could be considered as consenting because she was "in love" with her abuser.

The Court's consideration of young female victims of sexual violence in the cases cited is in my view deeply gendered. In the first case, the fact that the victim had had previous sexual encounters was qualified by the Supreme Court as abnormal for her age, and was used in favour of the perpetrator – who as a direct consequence of this obtained a milder sentence because the fact was qualified as less serious. Similarly, in the second case the Court unfortunately deemed it acceptable to frame the abuse that occurred between a thirteen-year old girl and an adult man in the context of a "love affair". I would argue that a similar assessment would have not been made had the child been male, but most importantly I would qualify it as deeply inappropriate that the fact that the supposedly romantic feelings attributed to the victim once again played to her disadvantage.

Lastly, a significant gender bias in the Court's judicial reasoning was also visible in its judgment no. 25138/2010. Here, the Court acquitted a man accused of abuse against family members *ex art. 572* of the Criminal Code on the grounds of the observation that the assumed victim (his wife) had not suffered from a breach of her physical or psychological integrity. The Court reached this conclusion by applying a clearly stereotypical view of the "normal" behaviour expected from domestic violence victims. The applicant husband had indeed highlighted that his wife had "a strong character", and the Court accepted this view by considering that the involved wife was "far from scared of her husband's behaviour", and was simply "shaken, exasperated and very emotionally charged" thus concluding that a breach of her physical and moral integrity had not been proven (*Corte di Cassazione Penale, sezione IV, sentenza* no. 25138 of 12 March 2010).

cohabitation in order to subtract oneself from domestic violence may remain undetected by the national authorities as well as by social services. More broadly, I would also argue that a legal requirement of cohabitation may exacerbate situations of oppression and unequal marital relationships which cannot be ascribed under the scope of art. 18-*bis*, but which may constitute significant triggers of domestic violence.

Secondly, the response of the Italian legislator to the ratification of the Istanbul Convention was strongly focused on criminal repression and was characterised by an underlying emergency discourse. The reform that followed the ratification indeed mainly concerned the Italian criminal law system, adopting “urgent provisions on security with the aim to contrast gender-based violence”⁵¹⁹. The only two other areas touched upon by the reform consisted in the regulation of anti-violence centres and, precisely, immigration law. Furthermore, the newly introduced art. 18-*bis* also appears to reproduce in part the focus on criminal repression. This is reflected in the reference to criminal proceedings and investigations as one of the two realms where the prerequisites for obtaining special permits for domestic violence shall be ascertained, and on the request of criminal judges’ opinions before issuing said permits in any case. Furthermore, art. 18-*bis*(4-*bis*) establishes that residence permits may be revoked to foreigners who have been condemned (also with a non-final sentence) for one of the criminal offences envisaged by this provision and committed in the context of domestic violence, and they may be expelled.

The almost exclusive focus on criminal law may be criticised *per se* from the specific point of view of immigrant women’s freedom from domestic violence. One may argue that concentrating on repression rather than also pursuing prevention, for instance by ensuring access to independent permits or to a more independent status of family members in family reunification regimes beyond the case where domestic violence has already been committed, may constitute a rather myopic choice with limited impact on the causes of the issue it targets. In this perspective, I will now move on to examine judicial examples of the interaction between fundamental rights and the concept of cohabitation as a legally-imposed requirement, exploring the role eventually played by the former in steering relevant norms in a more gender-sensitive direction.

From the outset, it must be noted that Italian administrative courts have repeatedly interpreted several norms of the *T.U.* as requiring cohabitation as a prerequisite for the validity of

⁵¹⁹ Art. 1 of *Legge* 119/203.

residence permits on the grounds of marriage. This has occurred in relation to not only the residence permit for family reasons envisaged by art. 30 of the *T.U.*⁵²⁰ but also long-term residence permits granted under article 9 of the *T.U.* on grounds of marriage⁵²¹. In these decisions, fundamental rights established by the Italian Constitution or by international conventional law ratified by Italy did not play any role. On the other hand, while it is not possible to identify a solid case law interpreting cohabitation requirements established by immigration rules in the light of fundamental rights, at least two judicial examples may be identified where this type of interpretation occurred.

In the first case, the Turin Administrative Court⁵²² held that a “constitutionally oriented” reading of article 30 of the *T.U.* demanded the renewal of a residence permit for family reasons to a Russian woman on the grounds of her marriage with an Italian citizen regardless of the fact that the two were not cohabiting at the time. In the Court’s view, the circumstance that the husband was being held in custody as a precautionary measure in view of a criminal proceeding against him “[could] not be considered as a fact grounding a lack of cohabitation as understood by the legislator⁵²³. Indeed, “a constitutionally oriented interpretation of the norm [demanded] to give exclusive importance to those hypotheses where lack of cohabitation is symptomatic of a lack of real conjugal relationship between husband and wife, so as to prove, in fact, that the marriage itself has been entered upon exclusively to allow the foreign spouse to access a more favourable permit for family reasons”,⁵²⁴. On the other hand, the Court held that an interpretation of this norm in the light of the Constitution suggested that “those unwanted situations of temporary absence of a spouse from the conjugal home which can only apparently be imputable to a lack of cohabitation must not negatively weigh on [the foreign] spouse”⁵²⁵.

The Turin Court’s decision to interpret a norm requiring continuous cohabitation as a prerequisite for maintaining residence rights acquired on grounds of marriage in the light of the Constitution is certainly significant. However, it is unclear which constitutional rights specifically the Court believed to be relevant in this case. What is more, this case did not

⁵²⁰ See for instance *Tribunale Amministrativo Regionale* (from now on, *TAR*) *Trieste*, sentenza no. 710 of 30 November 2001, and *TAR Ancona, sezione I*, sentenza no. 10 of 27 January 2006.

⁵²¹ See for instance *TAR Torino, sezione III*, sentenza no. 4166 of 13 November 2006, and *TAR Bologna, sezione I*, sentenza no. 105 of 31 January 2006.

⁵²² *TAR Torino, sezione III*, sentenza no. 385 of 15 April 2011.

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.*

specifically raise the issue of the extent of the State's obligation to protect immigrant women against domestic violence.

For these reasons, the second case ascribable to this section is especially noteworthy. In 2010, the Court of Novara produced an extremely interesting judgment⁵²⁶ concerning the case of a Russian woman whose application for a long-term residence permit on the grounds of her marriage with an Italian citizen had been rejected for lack of cohabitation between the spouses. Differently than in the previous judicial example, the requirement of cohabitation in this case was not explicitly envisaged by applicable norms (in particular by *d.lgs.* 30/2007), but had been imposed by the police authorities on the grounds of the different norm established by article 19(2)(c), which prohibited the expulsion of foreigners cohabiting with Italian spouses. In the specific case at issue, the couple did not cohabit at that time because the husband had been imprisoned as a precautionary measure after the applicant had reported him to the authorities for committing physical abuse and sexual violence against her. The applicant in this case however declared that, despite the domestic violence suffered, she did not intend to leave her husband, and that she had reported him to the authorities under the false belief that he would be checked into a rehabilitation facility to cure his drug addiction.

Significantly, the Court of Novara examined the entire case in the light not only of the national fundamental rights framework but also of international human rights law and European fundamental rights law as enforced in the domestic order. Firstly, the Court highlighted the “mutual assimilation of the protections offered by constitutional provisions and, from the outside, by the ECHR provisions as interpreted by the Strasbourg Court on the grounds of the ‘interposition’ established by article 117(2) of the Constitution”,⁵²⁷. Therefore, these two systems integrate and expand each other's protection of fundamental and human rights in order to reach the widest degree of protection possible in the domestic order. The Court also recalled that this is also reflected in the “obligation of ordinary judges to interpret domestic rules in conformity with international conventional law”,⁵²⁸, and stressed that “the protection of fundamental rights must be systemic and not fragmented in a series of uncoordinated norms potentially in conflict with each other”,⁵²⁹.

Secondly, the Court observed that “the entry into force of the Lisbon Treaty and thus of the Charter of Nice – i.e., the Charter of Fundamental Rights – has completed a process of

⁵²⁶ *Tribunale di Novara, sentenza* of 1 March 2010.

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.*

‘comunitarization’ of human rights”⁵³⁰. In the Court’s view, while this case could be considered as a purely internal situation, “surely after the entry into force of [the treaty of] Lisbon and the declaration of the binding force of the Charter – it will not be possible to assess it without taking into consideration the supranational constitutional principles established in the Charter”⁵³¹.

Therefore, the Court turned to examine the case at issue “in the light of a ‘conventionally compatible’ interpretation aimed at ensuring the ‘highest possible level’ of protection on the grounds of the described ‘multilevel system’”⁵³². In particular, it noted that the fundamental right to respect of private and family life is established by article 8 of the European Convention on Human Rights, article 7 of the European Charter of Fundamental Rights, article 12 of the Universal Declaration of Human Rights, art. 16 of the European Social Charter, and article 17 of the International Covenant on Civil and Political Rights. Similarly, the Court highlighted that article 29(2) of the Constitution establishes a fundamental right of “moral and legal equality” within marriage. On a more specific note, it relied on the Strasbourg Court judgment of *E.S. and Others v. Slovakia*⁵³³ to establish that the fundamental right to family life also encompasses “an obligation of every Member State to put in place adequate measures of protection against abuse within the family”⁵³⁴.

Against this rich normative background, the Court considered that while Italian citizens benefit from an effective protection against domestic abuse (because national law allows them to immediately obtain court orders imposing precautionary measures to protect them), the same is not true for migrant women. Indeed, on the one hand “the fact that precautionary measures involve putting an end to cohabitation – ranging from the removal from the conjugal home to precautionary detention – does not negatively impact victims, who can still freely determine their marital situation”⁵³⁵, that is, whether to end the marriage or not. On the other hand, the national authorities’ interpretation in the case at issue meant that this right – extended by the Charter to all individuals – was precluded to migrant women. Indeed, maintaining that a lack of cohabitation between spouses could automatically cancel the right of residence of the applicant “creates a clear discrimination between third-country national women and Italian women, and puts the former in the unacceptable condition of having to

⁵³⁰ *Id.*

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *E.S. and Others v. Slovakia* (Fourth Section), cit.

⁵³⁴ *Tribunale di Novara, sentenza* of 1 March 2010, cit.

⁵³⁵ *Id.*

choose between suffering family abuse by the spouse without reacting and to risk, after reporting her situation, being expelled from the State where she has built, as in the case at issue, her entire network of emotional, employment and economic relationships”⁵³⁶.

Therefore, the Court concluded that this lesser protection was not compatible with the multi-level system outlined. In the light of the recalled principles, the Court demanded an interpretation “whereby the possibility to react to family abuse with the means set forth by the State is guaranteed without any difference to any person present on the national territory, preventing that the status of Italian citizen or of third-country national woman married to an Italian citizen, or of legal resident on other grounds, could negatively affect her”⁵³⁷ as well as her freedom of self-determination in relation to her ethical and moral sphere⁵³⁸.

The mentioned judgments cannot support the conclusion that fundamental rights consistently prompted the Italian Court’s awareness of the deeply gendered effects of imposing cohabitation as a condition for the validity of residence permits. Nonetheless, I would assess that they constitute interesting examples of how fundamental rights, when actually recalled in judicial realms, have produced a crucial influence on immigrant women’s effective enjoyment of freedom from domestic violence in conditions of equality with Italian women, by encouraging more extensive and gender-sensitive interpretations of relevant Italian norms in this field.

d. Overall Influence of Italian Fundamental Rights Law on Immigrant Women’s Enjoyment of Family Life

On a broad level, the multi-level system of fundamental rights in force in the Italian domestic order produced positive results in judicial contexts, curbing the gendered and perverse effects of problematic provisions of Italian immigration law. Admittedly, in some of the examined aspects, judicial interpretations of these rights did not produce such results. In particular, in the considered judicial examples concerning special permits for pregnancy and maternity, judicial claims for the extension of these permits to unmarried partners or for the possibility to convert these permits into more stable ones which were based on fundamental rights were not consistently upheld by the competent courts.

⁵³⁶ *Id.*

⁵³⁷ *Id.*

⁵³⁸ *Id.*

Nonetheless, in the majority of the examined areas, Italian fundamental rights law played a seminal role from a specifically gendered point of view. Many of the judgments analysed in this section, indeed, offer examples of the extremely positive effects that fundamental rights-based interpretations of biased norms can produce on immigrant women's access to rights and entitlements in the field of family life in conditions of equality and non-discrimination. I have emphasised how the discussed norms, or their interpretation by the national authorities, produced the perverse effect of undermining immigrant women's equal access to rights in theory recognised to them, both in relation to immigrant men – as shown by the case of income requirements imposed by the family reunification regime– and to citizen women – as for instance in the case of cohabitation requirements. In many of the examined judicial examples, fundamental rights-based interpretations of these biased norms allowed Italian courts to unveil these forms of indirect discrimination against immigrant women. What is more, several forms of inequality were unveiled by these judicial analyses as the result of the contested norms and consequently corrected.

A first dimension of the perverse effects of indirect discrimination produced by certain Italian norms concerned immigrant women's right to equality with immigrant men. This aspect was particularly visible in Italian courts' examinations of claims of extension of special residence permits during pregnancy and maternity to fathers. Here, the Constitutional Court importantly grounded this extension also on the grounds of art. 30 of the Constitution, whereby mothers and fathers share the same duties as to childcare⁵³⁹. Notwithstanding the limited application of this principle only to married couples, it is still notable that the collateral effect of the constitutional values recalled in this judicial example was that of promoting an interpretation of the discussed norms in the sense of ensuring a more equitable distribution of care burdens within the family. A similarly positive effect was observable in the examples of judicial correction of the indirect discrimination against immigrant women, in relation to their possibilities to access family reunification in conditions of equality with their male counterparts. In this context, the examined judicial interpretations of income requirements disestablished the breadwinner model that the national authorities had tried to enforce, thanks to a constitutionally inspired framing of care work as actual work. Incidentally, this resulted in the recognition of unpaid carers' right to access family reunification in conditions of equality and non-discrimination not only with respect to

⁵³⁹ *Corte Costituzionale, sentenza no. 376/2000, cit.*

immigrant men but also to other immigrant women who were devoted to productive work, as made explicit by the Bologna Court⁵⁴⁰.

A second important dimension of immigrant women's right to non-discrimination in the field of family concerned their access to rights and entitlements in this field in conditions of equality with citizen women. This aspect was well illustrated by the example of the Novara Court⁵⁴¹, where a judicial analysis firmly grounded on the multi-level system of fundamental rights protection in force in the Italian order prompted the recognition of the indirect discrimination resulting from the interaction between norms from different legal domains. Thus, this type of framing allowed the competent court not only to unveil how the discussed norms disproportionately undermined immigrant women's possibility to obtain protection against domestic violence, but also to connect norms from traditionally separated legal domains – family reunification law and criminal law– in order to understand their disparate impact as a whole on this category. The meaningfulness of this example therefore also lies in its quality of further proof of the beneficial effects of a contextual legal analysis for immigrant women specifically, and of the possible contribution that fundamental rights may provide to encouraging this type of judicial discourse.

3. Immigrant Women's Fundamental Rights in the Field of Employment: Problematic Provisions of Italian Law

In this section devoted to immigrant women's fundamental rights in the field of employment in the Italian legal context, I am going to focus on two main issues. Firstly, in sub-paragraphs a) and b), I will discuss the most problematic effects of Italian labour migration rules on immigrant women workers, highlighting its main gendered shortcomings through the lens of immigrant women workers' fundamental right to be free from exploitation and abuse. In doing so, I will examine whether and to what extent such a right has, so far, been able to bear a positive influence on problematic norms in this field. Secondly, in sub-paragraph c), I will move on to consider immigrant women's effective enjoyment of their fundamental right to non-discrimination in the field of employment, *per se* and with reference to limitations established by Italian law to their access to specific professions.

⁵⁴⁰ *Tribunale di Bologna, ordinanza* of 14 November 2002, cit.

⁵⁴¹ *Tribunale di Novara, sentenza* of 1 March 2010, cit.

a. Immigrant Women's Freedom from Exploitation and Abuse Versus Links With Employers Established by Italian Law

Several norms of Italian law establish a somewhat problematic link between immigrant workers and their employers, in some cases granting the latter with a great amount of power and control over the acquisition of residence permits for work reasons. These features are particularly evident in the rules on the first entry of immigrant workers in Italy through labour migration schemes and in the legal framework established to support their emergence from informal work.

With reference to immigrant workers' first entry in Italy, article 22 of the *T.U.* establishes that employers pursuing to hire a third-country national must present an application before the immigration authorities, showing that the worker will enjoy proper housing, declaring that any variation concerning the employment relationship will be reported and submitting a proposal of the so-called *contratto di soggiorno*. This "residence contract", pursuant article 5-bis of the *T.U.* and article 8-bis of *D.P.R.* 394/1999, consists in a declaration of the employer stating that he or she can provide suitable housing to the third-country national worker and that he or she will pay for the repatriation expenses of the worker. The employer's application must also include, among other documentation, an employment contract proposal respecting minimum standards as to working time and – in the case of domestic work – pay⁵⁴². No obligation for the employer to provide housing for free is established. If the employer plans to detract a sum from the employee's pay as compensation for housing, art. 30-bis(4) of *D.P.R.* 394/1999 establishes that the amount of the detraction must not affect more than one third of the pay and must be expressly indicated in the *contratto di soggiorno*. The described procedure must be activated when the third-country national worker is still residing in his or her country. If the employer does not know any third-country nationals but he or she would like to employ one, art. 22(3) of the *T.U.* envisages the possibility to ask for an authorisation of entry for a worker enrolled in special lists which Italy may draft together with specific countries in order to regulate the entry and stay of workers from such countries. In any case, an authorisation of entry cannot be granted if the employer has been condemned for supporting the irregular entry of third-country nationals in Italy, for criminal offences related

⁵⁴² Pursuant art. 30-bis(3)(c), the employment contract must involve "full-time employment or part-time employment of above 20 hours per week, and in the case of domestic work, monthly pay above the minimum amount envisaged by welfare cheques".

to trafficking for the purpose of sexual exploitation and forced prostitution as well as to labour exploitation.

Having obtained the so-called “authorisation to work”, the third-country national will be able to enter Italy through a work visa. Art. 22(6) of the *T.U.* establishes that the third-country national worker must sign the *contratto di soggiorno* proposed by the employer within eight days, without any possibility to modify it⁵⁴³. This step will be the first occasion for active participation of the third-country national worker in his or her labour immigration procedure. The employer will have already prepared an employment contract specifying working conditions and eventually pay, the employee’s housing conditions and eventually how much will be detracted from the worker’s pay to compensate for the provision of said housing. In addition to this, the employer must accompany the third-country national to the immigration authorities’ offices to subscribe the *contratto di soggiorno* and is also required to communicate the stipulation of a work contract with the third-country national within 48 hours of the subscription of the *contratto*⁵⁴⁴.

A similar power to the employer is granted by the rules governing the regularisation procedure for the third-country nationals performing informal work in the domestic sector. Art. 1-ter of law 102/2009 leaves the initiative of reporting an informal employment relationship to employers, who will have to submit – among other documentation – a *contratto di soggiorno* proposal as well as a declaration that they will respect minimum standards established by law as to pay and working hours. Employers will then also be obliged to accompany domestic workers to the immigration authorities in case of acceptance of their application in order to have them sign the *contratto di soggiorno* as well as submit a request for a residence permit for work reasons. It is extremely important to note that pursuant art. 1-ter(8), if the employer or the employee do not show up after being summoned by the immigration authorities without a valid justification, the entire procedure will be dismissed. The employer is also required to report the hiring of the worker within 24 hours after the *contratto di soggiorno* is signed. As in the case of the first entry procedure, it is also possible to observe a strong control of employers over the entire regularisation process.

⁵⁴³ See article 35(1) of *D.P.R.* 394/1999.

⁵⁴⁴ This obligation of the employer has been reiterated in recent years in the context of the annual decrees establishing maximum quotas of admission of third-country national workers. For the year 2011, see the *Circolare del Ministero dell’Interno e del Ministero del Lavoro e delle Politiche Sociali* of 25 February 2011.

Both of the described legal regimes, i.e., that on labour migration and that on regularisation procedures, grant in my view a substantial amount of control to employers, which may disproportionately and negatively affect immigrant women workers' possibilities to effectively react to labour exploitation and abuse from employers without jeopardising their residence status

In this respect, two matters appear of importance. The first relates to the possibility for immigrant women to work for a different employer after arriving in Italy on the grounds of the authorisation to work granted in the context of this procedure (which may be pursued for instance because the working conditions actually imposed by the employer are exploitative, or in order to react to a refusal of the initial employer to hire them which may in turn give rise to severe exploitation and abuse grounded on the irregular status of the worker). A second key matter concerns the remedies available to domestic workers against their employer's refusal to regularise them. The isolation typical of this profession and the high risk of abusive or exploitative working conditions – especially when performed informally – may indeed be aggravated by forms of blackmail by employers, who may threaten not to commence or follow through with the regularisation procedure in order to keep the domestic worker in a subservient position and even to discourage her from reporting violence, abuse, sexual harassment or labour exploitation.

Therefore, I will now turn to examine these two normative areas in the light of immigrant women workers' fundamental rights. In relation to initial entry, I will discuss two examples of judicial resistance to a more favourable interpretation recommended by the Ministry of Interior, and on the breaches of immigrant women's fundamental rights that they may generate. With reference to regularisation procedures, I will instead consider how fundamental rights may produce a positive influence on their highlighted shortcomings.

With respect to the initial entry procedure, a 2007 circular by the Ministry of Interior clarified that when a third-country national enters Italy with an authorisation to work and a related visa in the context of this procedure, and the employer refuses to hire him or her, "the foreigner can apply for a residence permit on grounds of pending occupation, declaring that his or her employer is no longer intending to hire him or her"⁵⁴⁵. As a result, immigrant women workers have been able to counter before administrative courts the rejection of their applications for residence permits – or for their renewal – justified by the fact that they were not employed by

⁵⁴⁵ *Circolare del Ministero dell'Interno* of 3 September 2007.

the person who had applied for their authorisation to work⁵⁴⁶. These administrative decisions did not seem to grant much importance to whether the migrant workers involved had explicitly reported their employers' refusal to the immigration authorities or not.

Nonetheless, in some cases Italian jurisprudence offered examples of judicial resistance to such an interpretation. In 2011, for instance, the Naples administrative Court⁵⁴⁷ upheld the rejection of an application for a residence permit for work reasons by a Chinese woman on the grounds that she had never been employed (as a domestic worker) for the person who had initiated her labour migration procedure⁵⁴⁸. Subsequently, a 2012 judgment by the administrative Court of Trieste⁵⁴⁹ justified the link between the regularity of an immigrant woman's stay and her working for the initial employer, what is more with the declared aim of protecting her human dignity. In particular, the Court supported "the need that the employment relationship, to which the request of authorisation to work and the following *contratto di soggiorno* are aimed, is actually established with the specific employer who has passed the controls of the immigration authorities, because that is the employer who has been authorised to hire by virtue of his or her suitability, reliability and morality, and not others"⁵⁵⁰. In the Court's view, the lack of an effective establishment of the employment relationship "bears (...) the consequence (...) that it is absolutely uncertain that the foreigner can reside in

⁵⁴⁶ See for instance, *TAR Venezia, sezione III, sentenza* no. 2648 of 3 September 2008 (concerning a third-country national woman who was employed as a domestic worker by a different employer because by the time she had entered Italy her prospective employer had passed away), *TAR Venezia, sezione III, sentenza* no. 3681 of 26 November 2008 (concerning a Moldavian woman whose prospective employer had refused to hire her after her entry in Italy), *TAR Venezia, sezione III, sentenza* no. 179 of 7 February 2012 (concerning an Albanian woman working for a different company than the one that had applied for her authorisation to work). See also, although this case concerned a man, *TAR Venezia, sezione III, sentenza* no. 994 of 14 June 2011 (concerning a third-country national worker who was employed elsewhere because the prospective employer who had filed an application for him had subsequently disappeared).

⁵⁴⁷ *TAR Napoli, sentenza* no. 2253 of 20 April 2011.

⁵⁴⁸ The applicant, instead, was employed in her sister's company. While she argued that her prospective employer had refused to hire her once she had entered Italy on the grounds of alleged financial difficulties, her prospective employer declared that the applicant had disappeared right after concluding the procedure aimed at the granting of a residence permit. In this case, the Court observed that the applicant should have reported the employer's refusal to the authorities, which would have granted her a residence permit pursuant the 2007 Circular, and considered her negligence in this respect as a hint that she had intended to defraud the Italian system and to work for her sister all along. The cited administrative decisions concerning the Circular did not seem to grant a crucial importance to whether the migrant workers involved had explicitly reported their employers' refusal to the immigration authorities. The Naples Court, however, maintained that the procedure envisaged by Italian labour migration law should have been complied with in order to respect "the regulatory aims of the system" (*id.*). The regulation of migration fluxes by Italian immigration law, indeed, "is aimed at admitting (...) a maximum number of foreigners, balancing values of protection of human rights on the one hand and those – not less important – of border control, protection of national security, fight to crime and the principle of legality" (*id.*). This, in the Court's view, justified the rejection of the applicant's claims because she had failed to respect the formal rules enforcing such a delicate balance.

⁵⁴⁹ *TAR Trieste, sentenza* no. 418 of 15 November 2012.

⁵⁵⁰ *Id.*

Italy in a dignified manner and support himself or herself with the legal proceeds of his or her work”⁵⁵¹. Although the Court ultimately rejected the application because the applicant failed to satisfy requisites concerning minimum periods of work necessary to benefit from regularisation procedures, the fact that the majority of its reasoning focused on a restrictive interpretation of the discussed norms is significant in itself.

These examples of judicial resistance to the Ministry’s guidelines appear particularly worrying because the eventual affirmation of the principles established by these courts on a broader scale may give rise to violations of immigrant women workers’ fundamental rights. In particular, the rights to receive adequate remuneration, to weekly rest and to paid annual holidays protected by art. 36 of the Constitution are seriously jeopardised by a judicial interpretation that ultimately forces immigrant workers to remain with a specific employer as a precondition for maintaining their residence rights. Such an interpretation, indeed, grants employers with great leverage and constitutes an objective obstacle to the possibility for the employee to negotiate adequate working conditions. In the most extreme cases, this may give rise to a violation of the prohibition to conduct private economic activities in breach of safety, liberty and human dignity *ex art. 41 of the Constitution*, provided of course that the employer is a private enterprise. In this light, the calls to human dignity by the Court of Trieste in the abovementioned example as grounding its restrictive judicial interpretation appear quite paradoxical. One may indeed question whether exposing third-country national workers to the risk of finding themselves in an irregular status in their host country simply because the person who initiated their migration process subsequently refuses to hire them may support their possibilities “to live in Italy in a dignified manner”⁵⁵², much less of supporting themselves through legal channels.

In the context of regularisation procedures, on the other hand, an interesting example of the positive influence of fundamental rights on an immigrant woman’s possibility to react to her employer’s refusal to regularise their situation has been provided by a 2009 judgment by the Court of Brescia⁵⁵³. In this case, a domestic worker from Salvador submitted that her employer refused to regularise her status pursuant Law 102/2009 and that she had dismissed her for this reason. Significantly, the Court recalled the Italian Constitution to assess this

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ *Tribunale di Brescia, sezione lavoro, ordinanza of 25 September 2009*. For details on this case provided by the *Associazione Studi Giuridici sull’Immigrazione*, see http://www.asgi.it/home_asgi.php?n=documenti&id=1307&l=it [last accessed on 14 March 2014].

claim, holding that the dismissal had to be annulled because of its discriminatory character “on the ground of the applicant’s status of irregularly resident foreigner”⁵⁵⁴ and ordering the applicant’s reintegration in her employed position as well as her regularisation by the employer. In particular, the Court importantly established that “only by affirming the existence of a right of the employee to be regularised it is possible to realise an interpretation [of law 102/1999] in conformity with the Constitution, since it cannot be maintained that the submission of the regularisation application pursuant article 1-ter of law 102/999 is linked to the mere discretion of the employer”⁵⁵⁵. Similar conclusions were also reached by administrative tribunals, but without any reliance on the fundamental rights of the involved workers⁵⁵⁶.

Despite its isolated character, the case assessed by the Court of Brescia epitomises how fundamental rights may successfully promote extensive interpretations of norms concerning regularisation procedures in particularly important aspects of immigrant women’s working lives. The Court did not specify which constitutional provision in particular inspired its reasoning, but rather referred to the Constitution as a whole. I would argue that the right to adequate remuneration, weekly rest, and annual holidays enshrined in art. 36 may once again constitute an important reference in this matter, considering that this right may be seriously endangered in informal work contexts, if read in conjunction with the fundamental right to substantial equality established by article 3. In this respect, it is also interesting to observe that being an irregularly resident migrant was identified by the Court as a prohibited ground of discrimination under the Constitution.

b. Links With Employers in Residence Permits for Entertainers: Observations for a Future Analysis in a Fundamental Rights Perspective

A legal framework which has yet to be addressed from a human and fundamental rights perspective in the Italian context but which is in my view deserving of a special attention is provided by the rules governing residence permits for entertainers. Art. 27 of the *T.U.* includes “dancers, artists and musicians to be employed in entertainment clubs”⁵⁵⁷ among the professions for which admission is possible beyond annual quotas. A 2006 Circular by the

⁵⁵⁴ *Ibid.*, § 5.

⁵⁵⁵ *Ibid.*, § 4.

⁵⁵⁶ See for instance *TAR Ancona, sezione I, sentenza* no. 1130 of 10 November 2006 and *TAR Firenze, sezione II, sentenza* no. 1967 of 6 December 2012.

⁵⁵⁷ See article 27(1)(n) of the *T.U.*

Ministry of Interior⁵⁵⁸ regulates the procedure by establishing that employers (managers or producers) will have to apply for an authorisation of first entry for the third-country nationals pursuing work as entertainers in Italy. As normally envisaged by the general procedure, prospective employers will have to apply for a work authorisation and declare in that context that they will cover the repatriation expenses of the third-country national workers and will report any change in the employment relationship to the authorities. Moreover, prospective employers are required to declare that they will not dismiss the worker before the expiration of the contract for reasons beyond those allowed by law or by the contract itself. Pursuant art. 27(2), third-country nationals granted with entertainers' permits cannot be employed in a different sector, nor can they be hired with a different qualification. Art. 40(14) of *D.P.R.* 394/1999 also prevents this category from changing employer, stating that renewals of authorisations to work and residence permits can only be granted "to continue the employment relationship with the same employer".

Several aspects of the described provisions appear to foster a high risk of labour exploitation and abuse from employers for third-country nationals holding entertainers' permits. The tight links with employers and with the specific profession established by this framework appear particularly noteworthy, especially if considered in conjunction with the strong control granted by Italian law in general to employers over application procedures and their obligation to cover the workers' repatriation expenses.

In support of this view, it may be observed that several aspects of the Italian legal framework recall critical features of the Cypriot immigration regime for "artistes", which were criticised by the European Court of Human Rights in the *Rantsev* case⁵⁵⁹ as fostering the trafficking and exploitation of immigrant women. For instance, the Court noted that "while an obligation on employers to notify the authorities when an artiste leaves her employment (...) is a legitimate measure to allow the authorities to monitor the compliance of immigrants with their immigration obligations"⁵⁶⁰, such provisions must be carefully enforced because "measures which encourage owners and managers to track down missing artistes or in some other way to take personal responsibility for the conduct of artistes are unacceptable in the broader context of trafficking concerns regarding artistes in Cyprus"⁵⁶¹. Similarly, the Strasbourg Court chastised the legal choice to require employers to undertake the

⁵⁵⁸ *Circolare del Ministero del Lavoro* no. 34 of 13 December 2006.

⁵⁵⁹ *Rantsev v. Cyprus and Russia*, cit.

⁵⁶⁰ *Ibid.*, § 292.

⁵⁶¹ *Id.*

responsibility to reimburse the State for repatriation expenses sustained in relation to their employees⁵⁶². These aspects were among those considered by the Court as indicators of the State's failure to effectively protect immigrant women against trafficking and exploitation under article 4 of the European Convention.

In the Italian context, concerns over the risk of trafficking implied by residence permits for entertainers have been voiced by the 2011 CEDAW Shadow Report on Italy. In particular, the Report stressed that "entry in Italy with a residence permit for entertainers (the limited duration of which is linked to the willingness of the employer to maintain the contract) creates a situation of dependence from club managers which is often conducive to exploitation"⁵⁶³. While the problem of the compatibility between immigrant women's fundamental rights and the rules established by Italian law in this field has yet to be examined, I would argue that such an analysis is not only much needed but also potentially fruitful. In this respect, the *Rantsev* case may constitute a crucial legal reference for domestic courts in analysing the described regime in the light of immigrant women's human right to be free from trafficking and labour exploitation under article 4 of the Convention (which enjoys a constitutional rank in the Italian order on the grounds of article 117 of the Constitution). Moreover, the latter source may combine with the prohibition of slavery, servitude, forced or compulsory labour and trafficking and the right "to engage in work and to pursue a freely chosen or accepted occupation" respectively established by articles 5 and 15 of the European Charter, as well as with the constitutional right to equality before the law without distinction of sex (art. 3), creating a multilevel human and fundamental rights framework in the light of which domestic courts may examine the norms at issue. In fact, I would argue that this framework is likely to support a reconsideration of the Italian regime on third-country national entertainers due to its numerous problematic triggers of labour and sexual exploitation.

c. Discrimination Against Immigrant Women in Access to Employment: Does the Italian Anti-Discrimination Regime Live up to Fundamental Rights Standards?

Art. 2(3) of *T.U.* provides that "the Italian Republic, enforcing the ILO Convention n. 143 of 24 June 1975 received with law n. 158 of 10 April 1981, guarantees to all foreign workers regularly residing on its territory and to their family equality of treatment and full equality of rights with respect to Italian workers". In turn, article 10 of the ILO Convention binds States

⁵⁶² *Ibid.*, § 293.

⁵⁶³ CEDAW Shadow Report, cit. [translation mine], p. 43.

Parties to pursue national policies aimed at guaranteeing “equality of opportunity and treatment in respect of employment and occupation”. With specific reference to access to employment, article 43 of the *T.U.* prohibits discrimination on racial, ethnic, national or religious grounds– defined as “any behaviour which, directly or indirectly, entails a distinction, exclusion, restriction or preference” on these grounds “with the aim or effect of destroying or undermining the recognition, enjoyment or exercise, in conditions of equality, of human rights and fundamental freedoms in (...) the economic field”. Art. 43(2)(c) provides that “any person illegally imposing more disadvantageous conditions or refusing to allow access to employment (...) to regularly staying foreigners (...) only by virtue of their conditions of foreigners or of their belonging to a specific race, religion, ethnic group or national group” puts in place an act of discrimination. Art. 43(2)(e) also deems as discrimination any act of the employer or of his appointees which produces a negative effect on workers on the grounds of race, ethnic origin, language, religion or citizenship – even indirectly.

As for the laws receiving the European anti-discrimination directives, legislative decree 215/2003 (receiving Directive 2000/43) prohibits discrimination on grounds of race and ethnic origin in relation to “access to employment and self-employment, including criteria of selection and preconditions for hiring” at art. 3(1)(a). Important limitations are established by art. 3(2), whereby “this legislative decree does not cover differential treatment on the grounds of nationality and does not undermine national law and preconditions concerning entry, residence, access to employment, social assistance and security of third-country national citizens (...) on the national territory, nor any treatment, adopted according to the law, deriving from the legal situation of these individuals”. Furthermore, art. 3(4) also establishes that differential treatment which is indirectly discriminatory but which is “objectively justified by legitimate scopes pursued through appropriate and necessary means” does not amount to discrimination prohibited by the decree. A similar legislation is also established by d.lgs. 216/2003 (receiving Directive 2000/78) concerning less relevant grounds of discrimination for immigrant women workers, i.e., religion, personal belief, disability, age and sexual orientation.

The Equal Opportunities Code of 2006 (amended in 2010 to receive Directive 2006/54) prohibits at article 27 “any discrimination on the grounds of sex concerning access to dependent employment or self-employment or any other form of employment, regardless of the hiring conditions and in any sector or branch of activity, at any level of the professional hierarchy”. Article 27(2) provides that sex discrimination is also prohibited when it occurs on

the grounds of marital status, family status or pregnancy, or indirectly through job advertisements in the media that specify a particular sex as a precondition for applying. The only admitted derogations by this article concern particularly burdensome professions as identified through collective bargaining and cases where belonging to a specific sex is an essential requisite due to the nature of the specific profession.

In respect to the question of whether the Italian anti-discrimination framework lives up to immigrant women workers' fundamental right to non-discrimination recognised by the Constitution, it must be observed that Italian jurisprudence does not offer decisive hints in either direction. On a broad level, the Constitutional Court assessed that the principle of equality established by article 3 of the Convention not only prohibits discrimination in relation to foreigners' inviolable human rights but also imposes that any differential treatment must be reasonably justified and cannot simply disfavour foreigners as such⁵⁶⁴.

However, it is regrettable that no judgments concerning sex discrimination claims submitted by immigrant women in the field of employment – in the context of the multi-level system of fundamental rights protection in force in Italy – are traceable in Italian jurisprudence. Discrimination on the grounds of nationality, on the other hand, has been discussed by Italian courts both in general terms⁵⁶⁵ and in relation to cases concerning immigrant women workers.

⁵⁶⁴ *Corte Costituzionale*, sentenza no. 432 of 28 November 2005, see especially § 5.1. ff. of Legal Grounds.

⁵⁶⁵ In 2009, the Court of Milan (*Tribunale di Milano, sezione lavoro, ordinanza* of 20 July 2009) was submitted with the question of whether a public transportation company's imposition of Italian or Union citizenship as a prerequisite for hiring personnel was discriminatory. The Court assessed that the Royal Decree on which the exclusion was grounded (*Regio Decreto* no. 148 of 8 January 1931) had to be considered as automatically abolished because of its contrast with the fundamental right to equality and non-discrimination as affirmed by article 3 of the Constitution and as received from international human rights law through articles 10 and 117 of the Constitution (including the principle of equality established by the ILO Convention no. 143/1975 referred to by art. 2(3) of the *T.U.*).

Subsequently, an important role was also played by fundamental rights in relation to a 2010 case before the Court of Milan concerning the exclusion of a third-country national from a competition for the post of teacher in a public school (*Tribunale di Milano, sezione lavoro, decreto* of 11 January 2010). After obtaining the position, the applicant's appointment was annulled exclusively because he lacked Italian or Union citizenship. In this case, the Court interestingly recalled article 4 of the Italian Constitution – despite the fact that it literally recognises the fundamental right to work “of all citizens” – observing that this right “cannot exclude the protection and guarantee of the possibility to access the labour market and the free choice and exercise of professional activities” (*id.*). Moreover, the Court relied on the framework constituted by the principle of equality “for non-citizens as well” (established by article 3 of the Constitution, by the ILO Convention n. 143/1975 and by the anti-discrimination provisions of art. 2(3) of the *T.U.* as well as by art. 3 of the d.lgs. 215/2003) to argue that the ultimate aim of law in this field is “to support the principle of equality between third-country nationals and Italians” (*id.*) Against this normative background, the Court observed that the exclusion of the applicant on the grounds of his nationality was discriminatory because “the Treaty and European Union law as a whole pursue to remove all obstacles to freedom of movement of workers within Europe (...) but cannot be interpreted as some sort of *conventio ad excludendum*” and that “the aim of excluding third-country national workers (...) not only cannot be found in any provision of Union law but it also

While none of these cases concerned sex discrimination, I will now turn to briefly analyse judicial examples of enforcement of the fundamental right to equality in relation to access to employment in a field characterised by a high concentration of immigrant women, i.e., the healthcare sector⁵⁶⁶. Therefore, although the importance of the judicial principles established in this context transcends the specific situation of immigrant women, the fact that these principles were established in relation to access to nursing professions may be considered as a particularly important result for this group.

Two interesting judicial examples in this sense are identifiable. In the first case, the Court of Lodi⁵⁶⁷ was submitted with the case of a Nigerian nurse who had been excluded from the possibility to participate in a competition to switch from a fixed-term to an indefinite contract because she did not fulfil the requirement of Italian or Union citizenship. Before the Court of Lodi, the applicant – who held a long-term residence permit – submitted that she had been subjected to discriminatory treatment by the hospital. The hospital maintained that Italian laws on access to employment in public administrations included the requisite of Italian citizenship. It is extremely interesting to note that the Court interpreted the norms at issue as only admitting reservations to Italian citizens when implying the exercise of public powers (which was not the case of nurses) by specifically relying on “the constitutional principles of equality”⁵⁶⁸ and by international human rights law sources. The Court indeed observed that

openly clashes with transnational general principles on which also the norms on European integration are based” (*id.*).

Lastly, a 2010 judgment of the Court of Milan (*Tribunale di Milano, sezione lavoro, ordinanza* of 30 July 2010) concerning the rejection of an Ecuadorian woman’s application for a post of keeper by a regional building company on grounds of nationality reassessed the principle whereby in the Italian domestic order “a non-absolute principle of equality between foreigners and Italian citizens exists in relation to access to employment (...) received through article 10(2) of the Constitution” (*id.*). The Court considered this principle “a useful parameter for the correct and appropriate interpretation of norms concerning the legal status of foreigners” (*id.*) and interpreted the case in this light, concluding that the principle of equality had been breached because the differential treatment of the applicant could not be justified – since the employer was not a public administration and because the exercise of public powers was not implied in the job (circumstances which would have justified a prerequisite of Italian or Union citizenship).

⁵⁶⁶ Currently, Italy is affected by a nursing shortage which has been attributed, among other factors, to the fact that “nursing is regarded as an extension of the women’s traditional role in society and not a role that is highly respected and remunerated” (Action for Global Health, *Addressing the Global Health Workforce Crisis: Challenges for France, Germany, Italy, Spain and the UK*, January 2011, p. 30, available at <http://www.hrhresourcecenter.org/node/3370> [last accessed on 13 July 2014]). In addition to the highly feminized character of this sector, it has been emphasised that a significant proportion of registered nurses in Italy are foreigners (28.4% in 2011), the majority of which are third-country nationals (*Id.*; see also Istituto Nazionale di Previdenza Sociale, *Un Fenomeno Complesso: il Lavoro Femminile Immigrato*, p. 30 ff., available at http://www.inps.it/news/Il_lavoro_femminile_immigrato.pdf [last accessed on 13 July 2014]).

⁵⁶⁷ *Tribunale di Lodi, ordinanza* of 18 February 2011.

⁵⁶⁸ *Ibid.*, § 3.

this interpretation “is necessary in order to avoid an unreasonable and arbitrary mortification of the unswerving right to work, according to the spirit of the Universal Declaration of Human Rights (...), which recognised among fundamental rights the right to work (art. 23) to which every individual is entitled without any distinctions on grounds of nationality (art. 2)”⁵⁶⁹, and also recalled the right to work *ex* article 6 of the International Covenant on Civil and Political Rights.

The second judgment, before the Court of Milan⁵⁷⁰, concerned a joint application by a group of third-country national women who held that their exclusion from a competition aimed at recruiting nurses on the grounds of nationality constituted a form of discrimination in access to employment. Once again, fundamental rights had an important influence on the judicial assessment of a claim of discrimination. Firstly, the Court of Milan referred to the principles established by the Constitutional Court in its judgment no. 432 of 2005 – concerning the boundaries of the fundamental right to non-discrimination affirmed by article 3 of the Constitution – and applied them to the field of employment. In particular, the Court noted that the principle whereby differential treatment must always be justified by a rational and not arbitrary reason “cannot but apply to the right to work”⁵⁷¹. Secondly, the Court observed that “in the matter of access to employment, be that public or private, the principle of equal treatment and equality between Italian citizens, Union citizens and third-country nationals applies, because the principle affirmed in article 2 of the *T.U.* must find immediate and direct application with reference both to employment and to the perspective of employment”⁵⁷². Thirdly, the Court observed that the interpretation whereby reserving certain professions to Italian citizens is exclusively admissible when such professions entail the exercise of public powers (but not to nurses) “is the one most in compliance with constitutional principles”⁵⁷³. On these grounds, the Court found that the exclusion of the applicants from the competition at issue had a discriminatory character and ordered to cease it.

The discussed cases constitute interesting examples of enforcement of the multi-level system of fundamental rights protection applicable in the Italian order in the matter of access to employment in conditions of equality and non-discrimination. Here, the interpretation of

⁵⁶⁹ *Id.*

⁵⁷⁰ *Tribunale di Milano, sezione lavoro, ordinanza of 4 April 2011.*

⁵⁷¹ *Id.*

⁵⁷² *Id.*

⁵⁷³ *Id.*

Italian norms establishing a differential treatment between third-country nationals and Union citizens in the light of the fundamental right to non-discrimination recognised by this system prompted the recognition of the presence of discrimination on grounds of nationality with respect to access to employment – a ground on which the anti-discrimination legislation (both European and Italian) appears to be weaker. This positive influence of fundamental rights did not produce a specifically gender-sensitive analysis of the Courts in the cases at issue. As I have stressed above, such gender-sensitivity was not called for by the applicants' situation, which constituted textbook examples of discrimination on grounds of nationality and did not involve sex.

Nonetheless, I would argue that from a gendered point of view this case law may still produce positive effects specifically for immigrant women's access to employment in conditions of non-discrimination. After all, discrimination on the grounds of citizenship – especially when not sanctioned by law but rather enacted by employers – may hide other forms of discrimination, such as that on the intersecting grounds of sex and ethnic or racial origin. In this respect, I shall recall that nationality is a particularly important ground of discrimination against immigrant women – both alone and in combination with other intersecting grounds. In the previous chapters, I have repeatedly emphasised the extent to which nationality discrimination hinders immigrant women's access to the labour market in the European legal space, and consequently how crucial it is to interpret the scope of admissibility of differential treatment on the grounds of Union or national citizenship in a restrictive manner.

d. Overall Influence of Italian Fundamental Rights Law on Immigrant Women's Enjoyment of Workers' Rights

In the field of employment, the influence of Italian fundamental rights law on biased norms applicable to immigrant women was much less consistent than that observed in the field of family life. In fact, while I have highlighted how several areas of domestic law raise issues of compatibility with fundamental rights because of their disparate impact on immigrant women workers, Italian courts so far have offered few indications as to the capability of the multi-level fundamental rights framework in force in Italy to expose and correct the observed shortcomings. This feature alone, however, does not suggest an inherent incapacity of this system to serve as a ground to counter the discriminatory effects of certain national norms or of certain interpretations of such norms. The low availability of judicial examples of any type

of interaction, positive or negative, between norms applicable to immigrant women and Italian fundamental rights law, suggests that such a conclusion may be far-fetched. Rather, I would assess that a judicial attention to the highlighted problems has yet to develop in the Italian context, and that future developments in this area may offer further insights as to the potential and shortcomings of the multi-level system of fundamental rights protection in force in the Italian order in relation to the indirect discrimination deriving from biased norms applicable to immigrant women, and as to its capability to serve as a solid legal ground to correct these perverse effects.

With this aim, indications from supranational courts may also serve as useful references for national courts. For instance, in the case of entertainers' permits and labour exploitation, argumentations similar to the ones submitted in the *Rantsev*⁵⁷⁴ judgment before the Strasbourg Court would have a great chance of being upheld by Italian courts as well – considering the utter similarity of the problems observable in the Italian legislation with those criticised in the ECHR judgment. Indirectly, the observations of the Court in *Rantsev* concerning state responsibility in relation to breaches of art. 4 ECHR, due to the enforcement of national norms which establish a high level of dependence on employers, may also be used as an effective argumentation to contrast judicial interpretations of national rules on initial entry and regularisation procedures that grant excessive leverage to employers.

As to the matter of discrimination in relation to access to employment, the recent recognition of intersectional discrimination in the case of *B.S. v. Spain*⁵⁷⁵ by the Strasbourg Court may encourage similar claims in the Italian context by immigrant women. This, in turn, would push for a more heterogeneous case law at the national level on forms of discrimination other than nationality, in the field of employment and beyond. With specific reference to access to employment, moreover, the framing by the European Court of Justice in *Firma Feryn*⁵⁷⁶ of a case of possible discrimination on the grounds of nationality as race discrimination suggests that certain discrimination grounds may hide others – and that different legal grounds may be inextricably linked with each other. In this sense, the *Firma Feryn* case may also represent an important reference for Italian courts.

⁵⁷⁴ *Rantsev v. Cyprus and Russia*, cit.

⁵⁷⁵ *B.S. v. Spain*, cit.

⁵⁷⁶ *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, cit.

4. Concluding Remarks

In this chapter, I have provided several examples of problematic provisions of Italian immigration law from the point of view of immigrant women's family life and employment. In particular, I have discussed specific norms which produce a disparate impact on immigrant women, highlighting in what respect these sources fall short of the multi-level system of fundamental rights protection in force in the Italian order. On the one hand, from my analysis it emerges that Italian immigration law is in some cases affected by issues already observed both at national level (with respect to other domestic immigration regimes examined by the Strasbourg Court, which I have discussed in chapter 1) and on a supranational scale (with reference to the problematic norms of EU immigration law analysed in chapter 2). In some instances, indeed, Italian immigration law appears to overlook factual difficulties disproportionately experienced by immigrant women residing on its territory. As a consequence, when these apparently gender-blind norms are implemented, they reveal their gender-insensitive nature by producing a disparate impact on immigrant women. This is the case, for example, of Italian labour law and of its rules on first entry and regularisation procedures. In other instances, such as in the case of special residence permits for pregnancy and early maternity, the negative impact of Italian norms on immigrant women rests on the fact that specific rules established for this category's protection are restrictive to the point of making such protection void. Moreover, while the majority of the identifiable gender shortcomings relate to Italian law in itself, in some instances – and notably in the case of income requirements and of legally-enforced cohabitation – the disparate impact stemmed not from the law itself but rather from its interpretation by the national authorities.

On the other hand, Italian immigration law also presents specific shortcomings relating directly to the reception of EU law in the domestic order. As anticipated in the introduction to this chapter, the Italian case study provides examples of how the great discretionary power left to Member States by EU immigration law can translate into severely biased immigration regimes at the domestic level. This is particularly visible in the field of family life. For instance, the Italian case illustrates how the vast discretion left to Member States as to the possibility to introduce purely economic thresholds to third-country nationals aiming to sponsor family reunification may translate into domestic rules which, while in compliance with secondary EU law, negatively affect immigrant women's right to enjoy family life in conditions of equality and non-discrimination.

Moving on to my main research question, the analysis undertaken in this chapter offers several insights with respect to the role so far played by the multi-level system of fundamental rights in force in the Italian order *vis-à-vis* the observed shortcomings of Italian rules applicable to immigrant women, and to its potential for further development in this area. Arguably, the domain of family life emerged as much more dynamic than that of employment. In the family realm, indeed, several judicial examples showed a productive impact of fundamental rights-based discourses, which prompted gender-sensitive interpretations of certain norms of Italian law so as to avoid that such norms would result in indirect discrimination against immigrant women. Despite some setbacks, particularly in relation to exceptional residence permits for medical reasons, Italian fundamental rights law produced important results – such as the disestablishment of the one breadwinner model enforced in the context of family reunification, the support to a contextual interpretation of immigrant women’s right to live free from domestic violence and the promotion of a more equal distribution of reproductive work within immigrant families in relation to residence permits for medical reasons. As I have stressed above, it is notable that these achievements concerned immigrant women’s access to their right to family life in conditions of equality with both immigrant men and citizen women.

In the employment domain, on the other hand, fundamental rights were seldom recalled. Furthermore, when fundamental rights did produce positive results for the involved immigrant workers – as for the case of employment discrimination – it was always in a gender-neutral perspective. Nonetheless, two main areas were identified as potential playing fields for fundamental rights law in force in the Italian order: protection against labour exploitation and multiple or intersectional discrimination in relation to employment. These areas are indeed strictly connected to immigrant women’s right to enjoy employment-related rights in conditions of equality with both immigrant men and citizen women. Therefore, the lack of available judicial examples of application of fundamental rights in these fields from a specifically gendered point of view is cause for particular concern. In this respect, I have discussed how interesting cues could and should be extracted from both the European Court of Human Rights and the European Court of Justice.

CHAPTER FOUR

The Spanish Case:

Immigrant Women in Spain and Their Fundamental Rights

In the Fields of Family and Employment

Introduction

Similarly to Italy, Spain experienced a relatively recent transition into constituting a country of immigration. When the first immigration law was adopted in 1985⁵⁷⁷, the number of foreigners residing in Spain amounted to a mere 200,000 (mostly European citizens)⁵⁷⁸. From that date, immigration to Spain has been steadily increasing. According to Eurostat, in 2012 Spain was the EU Member State with the third highest number of third-country national immigrants in the European Union (after Germany and Italy), amounting to 6.9 % of the total population.⁵⁷⁹ The main motivation for female migration to Spain is constituted by search of employment, with the sole exception of those emigrating from African countries, which mainly enter through family reunification schemes. As a consequence, the majority of immigrant women enter Spain alone⁵⁸⁰. Among female migrants, those from Latin America constitute the most numerous groups. In 2011, the three most represented countries among the total number of immigrant women in Spain were Bolivia, Brazil and Colombia⁵⁸¹.

Within the initial migratory fluxes towards Spain, during the 1990s, women constituted a significant percentage of the total number of migrants, and in some national groups they

⁵⁷⁷ *Ley Orgánica sobre derechos y libertades de los extranjeros en España* no. 7 of 1 July 1985, *BOE* no. 158 of 3 July 1985. A *ley orgánica* is a source of law with the same binding force of ordinary law but for whose adoption, amendment, or repeal article 81(2) of the Constitution “requires an absolute majority of the members of Congress in a final vote on the bill as a whole”. Moreover, several matters are reserved by article 81(1) of the Constitution to the regulation of this source of law. Among them, the most interesting for our purposes concern those “relating to the development of fundamental rights and public liberties”. In this sense, *leyes orgánicas* enjoy a quasi-constitutional status.

⁵⁷⁸ GONZÁLEZ ENRÍQUEZ, C., ‘Spain’, in Triandafyllidou, A., Gropas, R., (eds.), *European Immigration: A Sourcebook*, Ashgate, Aldershot, United Kingdom, 2007, p. 321.

⁵⁷⁹ Eurostat, *Migration and Migrant Population Statistics*, 2013, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics#Publications [last consulted on 27 December 2013].

⁵⁸⁰ AÑON, J. M., ‘El Acceso de las Mujeres Inmigrantes a los Derechos Humanos: la Igualdad Inacabada’, 17(2) *Revista de Filosofía Jurídica, Social y Política* (2010) 241, p. 247 ff.

⁵⁸¹ OSO, L., CATARINO, C., ‘From Sex to Gender: The Feminisation of Migration and Labour-Market Insertion in Spain and Portugal’, 39(4) *Journal of Ethnic and Migration Studies* (2013) 625, p. 636

significantly exceeded men⁵⁸². Female migration to Spain at the time was fuelled by the stronger participation of Spanish women in the labour market and the consequent high demand for foreign domestic workers, and was further encouraged by quota systems recognising such a demand⁵⁸³. The subsequent decrease of the proportion of women in the total number of immigrant in Spain from 2000 until 2007 – due to the strong economic growth and specifically to the prosperity enjoyed by the construction sector, which was characterised by a high demand of male foreign workers – also meant that immigrant women have been less affected by the financial crisis which has stricken Spain since 2008, in the sense that unemployment rates have indeed been much higher for immigrant men than for their female counterparts⁵⁸⁴.

Nonetheless, immigrant women's situation on the Spanish labour market has always been one of particular disadvantage. On a broad level, this category has been affected by the low pays, fewer legal protections, and high informality characterising traditionally female jobs in Spain. Among those professions, immigrant women also disproportionately concentrate in the lower rungs of the national labour market, i.e., domestic and care work, housecleaning services, or sex work⁵⁸⁵. With specific reference to the economic crisis, it must be stressed that while immigrant women's employment rates have been less impaired, this category has been negatively affected in multiple ways. For instance, it has been observed that female migrants have been pushed by the crisis to accept worse labour conditions, a descending labour mobility, and stronger deskilling⁵⁸⁶. Other specific consequences of the financial crisis have consisted in a significant lowering of pays – despite the stable demand for immigrant women workers, especially in the service sector, in narrower chances for this category to transition into self-employment, in cuts to social assistance benefits which force them to sustain more expenses for schooling and health services, and lastly in “family de-unification”, whereby the family breadwinner remains in Spain while previously reunified, inactive family members – especially children – are sent back to the country of origin⁵⁸⁷. The latter process has disproportionately involved immigrant women, especially in the Latin American community, where women providers have been pushed by the higher costs of living to renounce enjoying family life with their children in Spain and to send them back to live with

⁵⁸² *Ibid.*, p. 628.

⁵⁸³ *Ibid.*, p. 629.

⁵⁸⁴ *Ibid.*, p. 630 ff.

⁵⁸⁵ JULIANO CORREGIDO, D., ‘Género y Trayectorias Migratorias en Época de Crisis’, 97(3) *Papers. Revista de Sociología* (2012) 523, p. 533 ff.

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.*

their grandparents in their countries of origin. These observations suggest a strict correlation between issues experienced by immigrant women in the employment domain and difficulties in the family realm.

In relation to family life, immigrant women in Spain commonly experience issues similar to those highlighted for the Italian context. Firstly, many foreign women living in Spain encounter disproportionate difficulties in reconciling work and family life, and this conflict is more likely to result in a “retreat” into the family realm than it would for Spanish women. Obviously, this issue is also intrinsically related to the employment domain. The disproportionate concentration of immigrant women in sectors of the labour market which grant them with few benefits in terms of pay, security and labour protection (thus making paid employment a less attractive choice), together with the absence of public care services and of family networks in the host country which may help them sustain care burdens, push immigrant women to renounce working altogether, whenever of course this is a viable option⁵⁸⁸. This phenomenon, in turn, negatively affects gender relations in immigrant households. Reinforcing immigrant women’s labour instability indeed also means strengthening their economic dependence on husbands and partners. Moreover, very rarely do the described difficulties in reconciling work and family life spur strategies based on a re-thinking of the gendered divisions between productive and reproductive work within the family⁵⁸⁹.

Secondly, immigrant women are disproportionately at risk of domestic violence or gender-based violence in comparison to Spanish women. In 2011, the percentage of foreign women reporting having suffered from gender-based violence at least once in their lifetime amounted to 20.9%, in contrast with 10.1% of Spanish women⁵⁹⁰. The double incidence of gender-based violence on non-Spanish women was consistently reported regardless of age, education, working situation, marital status, health conditions, and dependency situation. As to the most affected national groups, the most numerous reports came from women born in Romania, Morocco, Ecuador, Colombia, and Bolivia. Arguably, the significantly higher exposure of

⁵⁸⁸ PARELLA, S., SAMPER, S., ‘Factores Explicativos de los Discursos y Estrategias de Conciliación del Ámbito Laboral y Familiar de las Mujeres Inmigradas No Comunitarias en España’, 85 *Papers. Revista de Sociologia* (2007) 157, p. 162 ff.

⁵⁸⁹ *Ibid.*, p. 169.

⁵⁹⁰ Instituto de la Mujer, *Macroencuesta de Violencia de Género 2011: principales resultados*, Ministerio de Sanidad, Servicios Sociales e Igualdad, 8 February 2012, p. 20 ff., available at http://www.lamoncloa.gob.es/nr/rdonlyres/0ada074d-526e-4da5-aa8a-6f6846fefbf7/192959/principales_resultados_macroencuesta_2011.pdf [last accessed on 30 December 2013].

immigrant women to domestic and gender-based violence is imputable to multiple factors, including the lack of family and social networks to rely on, language barriers, the economic and legal dependence on the violent partner or spouse, as well as the fear of jeopardising one's residence by reporting a situation of abuse to the authorities⁵⁹¹.

Against this background, this chapter will discuss the Spanish case study starting – as chapter 3 did for the Italian case study – from the observation that domestic law applicable to immigrant women can actually exacerbate the described factual difficulties. The analysis that will be carried out in this chapter thus mirrors that undertaken for the previous chapter on Italy. Therefore, in this chapter I will examine gendered shortcomings of relevant provisions of Spanish law applicable to immigrant women with the ultimate aim to assess the normative and judicial impact of human and fundamental rights as tools to correct such a bias.

More specifically, in a first section of the chapter the system of human and fundamental rights applicable in the Spanish legal order will be critically assessed, with a view to providing a solid background concerning the fundamental rights recognised to immigrant women in Spain in the fields of family and employment. Subsequently, the gender bias of selected provisions of Spanish law will be discussed, highlighting gender-specific limitations indirectly or directly imposed to immigrant women's rights in the family life and employment domains respectively as a consequence of the described bias. This analysis will be then completed with an assessment of whether human and fundamental rights at different levels (international, European and national) have been able to provide Spanish courts with an effective ground to correct the observed gender bias of such problematic legal provisions, as well as whether and in what respects they have, on the other hand, failed to do so, and with an effort to draw perspectives of further development in this area.

⁵⁹¹ Amnesty International Spain, *Obstinada Realidad, Derechos Pendientes: Tres Años de la Ley de Medidas de Protección Integral Contra la Violencia de Género*, July 2008, p. 14, available at <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/OBSTINADA%20REALIDAD,%20DERECHOS%20PENDIENTES%20TRES%20A%C3%91OS%20DE%20LA%20LEY%20DE%20MEDIDAS%20DE%20PROTECCI%C3%93N%20INTEGRAL%20CONTRA%20LA%20VIOLENCIA%20DE%20G%C3%89NERO?CMD=VEROBJ&MLKOB=26649310606>, [last accessed on 30 December 2013]. See also RODRÍGUEZ YAGÜE, C., 'Mujer, Inmigrante, Irregular: Otras Víctimas Escondidas de la Violencia de Género', in De La Sierra, S., Ortiz Pradillo, J. C., (eds.), *El Derecho y la Economía Ante las Mujeres y la Igualdad de Género*, Lex Nova, Valladolid, Spain, 2012.

1. Foreigners' Fundamental Rights in the Spanish Legal Order

The Spanish Constitution of 1978⁵⁹² constituted a landmark step in the democratisation process after the end of the 40-years long Franco dictatorship. The rule of law principle established by the Constitution marked the transition from a legitimacy of power based on tradition and the leader's personality to one grounded on legal certainty and fundamental rights⁵⁹³. For immigrants in Spain, however, this change was not as pivotal as it was for Spanish citizens. If indeed "it would make no sense to speak of foreigners' rights during Franco regime, when Spanish people themselves did not enjoy any", it is also true that many immigration law sources adopted during the dictatorship persisted well after the adoption of the Constitution⁵⁹⁴.

The Spanish Constitution instead marked a break with the Francoist past from a gendered point of view. During the dictatorship, Spanish women had been deprived of human and fundamental rights in a very specific way. They had been forced into a patriarchal model of family whereby they were not recognised with legal capacity and submitted to their fathers' and husbands' authority⁵⁹⁵. Their economic dependence within the family was also reinforced by legally-enforced limitations to their access to the labour market, especially in sectors considered unsuitable for women. After the death of Franco in 1975, the women's movement flourished and the first legal reforms started to push women's legal status towards equality⁵⁹⁶. Nonetheless, women themselves – both as individual "founding mothers" and as a group – were almost entirely absent from the constituent process. All seven members of the Committee in charge of drafting the Constitution – the so-called "fathers of the Constitution" – were in fact men, chosen by a Constitutional Commission nominated by the *Congreso de los Diputados* (Chamber of Deputies) from all the main political parties represented in the Parliament⁵⁹⁷. This all-male presence is mirrored in the absence of a proper gender

⁵⁹² *Constitución Española*, passed on 31 October 1978 and ratified by referendum on 6 December 1978 (BOE no. 311 of 29 December 1978).

⁵⁹³ BARRANCO AVILÉS, M., *La Teoría Jurídica de los Derechos Fundamentales*, Editorial Dykinson, Madrid, Spain, 2004, p. 74.

⁵⁹⁴ AJA, E., 'La Evolución de la Normativa Sobre Inmigración', in Aja, E., Arango, J., (eds.), *Veinte Años de Inmigración en España: Perspectivas Jurídica y Sociológica (1985 -2004)*, Edicions Bellaterra, Barcelona, Spain, 2006, p. 18.

⁵⁹⁵ CUENCA GÓMEZ, P., 'Mujer y Constitución: Los Derechos de la Mujer Antes y Después de la Constitución Española de 1978', 8 *Revista de Filosofía, Derecho Y Política* (2008) 73, p. 78 ff, available at <http://universitas.idhbc.es/numero8.htm> [last accessed on 14 July 2014].

⁵⁹⁶ *Ibid.*, p. 83.

⁵⁹⁷ VARELA SUANZES-CARPEGNA, J., 'La Constitución de 1978 en la Historia Constitucional Española', 69 *Revista Española de Derecho Constitucional* (2003) 31, p. 42.

perspective in the Constitution, as suggested by the low number of specific references to women and in the lack of an explicit inclusion of women among the groups needing a special protection in the enjoyment of their rights⁵⁹⁸.

Turning to immigration law, the first attempt to adapt this source to constitutional norms and standards came only with the abovementioned *Ley Orgánica* n. 7 of 1985. Arguably, this lateness was also imputable to the fact that, at the time of the democratisation process, immigration was far from constituting a large-scale phenomenon and it therefore was not a main concern at the time.

In the mid-eighties, however, the fundamental and constitutional rights discourse penetrated immigration law. Public powers' concern with establishing and spreading constitutional values and human rights in order to mark a definite closure with the past also involved immigration⁵⁹⁹. The Preamble of the 1985 *Ley Orgánica* – despite the very restrictive content of its provisions – apparently mirrored such efforts by emphasising its aim to establish rules in the field of immigration on the grounds of the constitutional mandate represented by article 13 of the Constitution. The latter draws a key distinction between foreigners and Spanish citizens. While its paragraph 1 recognises foreigners with “public freedoms guaranteed by [Title I] in the terms established by treaties and the law”, paragraph 2 reserves to Spanish citizens “the rights recognised by art. 23” (that is, the right to participate in public affairs directly or through their freely elected representatives, as well as the right to access to public functions and positions in conditions of equality, with the requisites established by the law). The Preamble, on its part, highlighted the open character of the provisions of the *Ley Orgánica* on the rights recognised by Title I of the Constitution, “done in such a way that, on the one hand, those rights whose enjoyment must be recognised, because they are inherent to personhood, are explicitly established” while dictating “clear guidelines in relation to the other rights”⁶⁰⁰.

The reference to personhood in the Preamble of 1985 *Ley Orgánica* reflected a distinction traced by the Spanish Constitutional Court in the landmark judgment no. 107 of 1984⁶⁰¹.

⁵⁹⁸ *Ibid.*, 83 ff.

⁵⁹⁹ MARZAL YETANO, E., *El proceso de constitucionalización del derecho de inmigración: estudio comparado de la reformulación de los derechos de los extranjeros por los tribunales de Alemania, Francia y España; derechos precarios y emergentes*, Colegio de Registradores de la Propiedad y Mercantiles de España, Madrid, Spain, 2009, p. 151.

⁶⁰⁰ *Ley Orgánica* 7/1985, Preamble. Unless otherwise specified, all English translations of Spanish laws and judgments in this chapter are my own.

⁶⁰¹ *Tribunal Constitucional (Sala Segunda), sentencia* no. 107 of 23 November 1984.

Here, the Court drew three groups of constitutional rights with reference to immigrants: firstly, constitutional rights which “equally belong to Spanish citizens and foreigners, whose regulation must be equal for both”; secondly, “rights that do not belong to foreigners in any way (those recognised by article 23 of the Constitution)”; and thirdly, “other [rights] which will or will not belong to foreigners depending on what is established by treaties and legislations, with a differential treatment with Spanish citizens as to their exercise being therefore admissible”⁶⁰². The first group, in particular, is made up by those rights “that belong to persons as such and not as citizens, or (...) those which are essential to the guarantee of human dignity which, pursuant to art. 10(1) of [the] Constitution, constitutes the foundation of the Spanish political order”⁶⁰³. Art. 10(1), indeed, includes human dignity, together with “the inviolable rights which are inherent to it”, among the foundations of the domestic order.

In its subsequent case law, the Constitutional Court has further clarified the constitutional status of foreigners, in the sense of reinforcing the category of rights related to human dignity on the one hand, and of limiting the legislator’s discretion in relation to the third group of rights on the other⁶⁰⁴. In relation to the latter, in particular, the Court has clarified that the legislator must respect the essential content of said rights as established by the Constitution, referring to international treaties recognising similar rights as an interpretative aid, thus making clear that the assignation of certain rights to the third group should not be equated with their de-fundamentalisation, because it simply means that such rights are recognised in conformity with their legislative configuration⁶⁰⁵. A further intervention by the Constitutional Court⁶⁰⁶ also identified a fourth group of constitutional rights, constituted by those rights which are not inherent to human dignity but are recognised by constitutional provisions formulated in sufficiently broad terms as to include both citizens and non-citizens under their scope. In relation to these rights, the legislator may establish a differential treatment between citizens and foreigners, but cannot freely determine the content of said right, which has already been defined by the Constitution itself.

⁶⁰² *Ibid.*, § 4 of Legal Grounds.

⁶⁰³ *Ibid.*, § 3 of Legal Grounds.

⁶⁰⁴ RODRÍGUEZ, C. M., RUBIO MARÍN, R., ‘The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States’, Dembour, M., Kelly, T., (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, Abingdon, 2011, p. 79.

⁶⁰⁵ *Id.* See also *Tribunal Constitucional (Sala Primera)*, sentencia no. 242 of 20 July 1994 and *Tribunal Constitucional (Sala Primera)*, sentencia no. 95 of 10 April 2000.

⁶⁰⁶ *Tribunal Constitucional (Pleno)*, sentencia no. 236 of 7 November 2007, § 4 of Legal Grounds. See also RODRÍGUEZ, C. M., RUBIO MARÍN, R., ‘The Constitutional Status of Irregular Migrants’, *cit.*, pp. 87 – 88.

At the dawn of the new century, the restrictive 1985 *Ley Orgánica* was repealed by *Ley Orgánica* 4/2000 on the rights and freedoms of foreigners in Spain and on their integration⁶⁰⁷, which to this day constitutes the main *corpus* of rules in the field of immigration in the Spanish legal order. The most important change introduced by *Ley Orgánica* 4/2000 was precisely the establishment of a coherent statute of foreigners' rights inspired by the principle of equality and non-discrimination between regularly staying immigrants and Spanish citizens, together with the recognition of a minimum core of rights to irregularly staying migrants⁶⁰⁸. *L.O.* 4/2000 was modified on multiple occasions. A first reform occurred already in 2000 with *Ley Orgánica* 8/2000⁶⁰⁹. Subsequent changes were brought by *Ley Orgánica* 11/2003⁶¹⁰, *Ley Orgánica* 14/2003⁶¹¹ and most recently by *Ley Orgánica* 2/2009⁶¹².

As far as *L.O.* 4/2000 is concerned, its scope is defined by article 1 as including all foreigners, broadly defined as “those lacking Spanish citizenship”, and excluding European Union citizens (except for more favourable norms eventually established by the organic law). Title I of the law is entirely devoted to “foreigners’ rights and freedoms”, providing a sort of bill of rights for immigrants in Spain. Article 3(1) of the *L.O.* reinstates the constitutional principle of equality as interpreted by the Constitutional Court, providing that “foreigners in Spain enjoy the rights and freedoms recognised in Title I of the Constitution under the terms established by international treaties, by this law and by those which regulate the exercise of each one of them”, adding that “as a general interpretative criterion, it will be understood that foreigners exercise the rights recognised to them by this law in conditions of equality with Spanish citizens”. Foreigners’ right to equality and non-discrimination is then thoroughly developed in Chapter IV of the *L.O.*

Moreover, article 3(2) of the *L.O.* confirms the particularly important role played by international human rights law as an interpretative criterion of fundamental rights on the

⁶⁰⁷ *Ley Orgánica* 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 10 of 12 January 2000.

⁶⁰⁸ Aja, E., ‘La Evolución de la Normativa Sobre Inmigración’, cit., p. 27 ff.

⁶⁰⁹ *Ley Orgánica* 8/2000, de 22 de diciembre, de reforma de la *Ley Orgánica* 4/2000, de 11 de Enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 307 of 23 December 2000.

⁶¹⁰ *Ley Orgánica* 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros, BOE no. 234 of 30 September 2003.

⁶¹¹ *Ley Orgánica* 14/2003, de 20 de noviembre, de Reforma de la *Ley Orgánica* 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, modificada por la *Ley Orgánica* 8/2000, de 22 de diciembre; de la *Ley* 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local; de la *Ley* 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, y de la *Ley* 3/1991, de 10 de enero, de Competencia Desleal, BOE no. 279 of 21 November 2003.

⁶¹² *Ley Orgánica* 2/2009, de 11 de diciembre, de reforma de la *Ley Orgánica* 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 299 of 12 December 2009.

grounds of article 10 of the Spanish Constitution, stating that “norms concerning fundamental rights of foreigners will be interpreted in accordance with international treaties and agreements on the same matters which are in force in Spain”. Title I then proceeds to recognise foreigners with a wide array of fundamental rights. Among them, the most interesting for our purposes are the right to work and to social security established by article 10, whereby “resident foreigners that satisfy the conditions envisaged by this *Ley Orgánica* and in the provisions that specify it have the right to carry out a remunerated activity, autonomous or dependent, as well as to access the social security system in compliance with the law in force”. Other key social rights recognised by *L.O. 4/2000* are the right to healthcare (art. 12), the right to access public housing systems (art. 13) and the right to social security and social services (art. 14) – although with different intensity depending on residence status. In the field of family life, article 16 is a key provision because it grants regularly resident foreigners with the right to family life and to family intimacy as well as with the right to family reunification. Importantly, article 16(3) provides that “the spouse who has acquired residence in Spain for family reasons and his or her family members reunited with him or her will maintain residence even in case the marital link that grounded this acquisition is broken”, leaving to regulations to establish an eventual minimum period of cohabitation as a prerequisite for enjoying this right.

The following Titles of the *Ley Orgánica* are devoted to providing a general regime of entry and stay of foreigners in Spain. Title II establishes rules concerning the entry and stay of foreigners, delineating the visa and residence permits regime, while Title III focuses on irregularly staying migrants and on the corresponding sanctions for irregular stay (from fines to expulsion). Finally, Title IV contains provisions aimed at favouring the coordination between public powers and bodies in matters concerning migration.

Moving on to the Spanish Constitution, this source establishes a wide array of fundamental rights that are of great importance for third-country national migrants and have the potential of playing a positive role at judicial level for immigrant women in particular. Before discussing key provisions in the field of family life and employment, another crucial group of constitutional rules must be analysed, i.e., those norms regulating the reception of international human rights law as well as European fundamental rights law in the Spanish legal order. Three articles are particularly relevant in this respect.

Firstly, article 96(1) establishes that “validly concluded international treaties, once officially published in Spain, shall form part of the internal legal order” and that “their

provisions may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law”⁶¹³. This article regulates the reception of all sources of international treaty law into the domestic order⁶¹⁴.

A second, more specific norm, on the other hand, regulates the reception of international human rights treaties in the Spanish order: article 10(2), indeed, provides that “the principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain”. It has been importantly observed that article 10(2) grants international human rights treaties with a special status in comparison to international treaty law in general. In addition to the intangible character recognised by article 96(1) to the latter source once received in the domestic order, article 10(2) grants a “new and different effectiveness to international sources concerning [human] rights in comparison to other treaties which form part of the Spanish legal order”, consisting in their quality of “standard of interpretation of rights and freedoms established by the Spanish Constitution”⁶¹⁵. Thus, in addition to constituting a legal source with full effectiveness like all other international treaties ratified by Spain, international human rights treaty law has the character of “norm of constitutional interpretation”⁶¹⁶. The most important consequence of this privileged status in the Spanish legal order concerns the character of constitutional standard assumed by international human rights law – although not in a completely autonomous manner. In other words, any legal provision contrasting with interpretations of constitutional rights demanded by international human rights treaties ratified by Spain will be constitutionally illegitimate. Accordingly, all national courts will be obliged to enforce constitutional rights in a way which is respectful of international human rights treaties, to proceed to the non-application of legal provisions contrasting with such

⁶¹³ The official English translation of the Spanish Constitution can be found at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm [last accessed on 31 December 2013]. All the English translations of Spanish constitutional norms cited in this chapter should be understood as deriving from this source.

⁶¹⁴ GÓMEZ FERNANDEZ, I., *Conflicto y Cooperación Entre la Constitución Española y el Derecho Internacional*, Tirant Lo Blanch, Valencia, Spain, 2005, pp. 146 -153.

⁶¹⁵ CUENCA GÓMEZ, P., ‘La incidencia del Derecho Internacional de los Derechos Humanos en el Derecho Interno: la Interpretación del Artículo 10.2 de la Constitución Española’, 12 *Revista de Estudios Jurídicos* (2012), p. 3 [translation mine].

⁶¹⁶ *Id.*

interpretations and – if possible – directly apply relevant international treaties on the matter, being obliged otherwise to raise an issue of constitutionality⁶¹⁷.

It is also important to stress that the Spanish Constitutional Court has interpreted article 10(2) in an extensive way, in two main senses. Firstly, it has established that not only international human rights treaties, but all international treaties which may help to clarify the meaning of constitutionally-established fundamental rights, should be understood as recalled by article 10(2)⁶¹⁸. Secondly, the Constitutional Court established that not only the constitutional provisions enshrined in Title I (entitled “fundamental rights and duties”) but all norms of the Spanish legal order concerning fundamental rights must be interpreted according to the international sources recalled by article 10(2)⁶¹⁹. Interestingly, among international human rights treaties, the European Convention on Human Rights has been progressively but steadily recognised by the Constitutional Court as having a special relevance for the interpretation of the fundamental rights established by the Constitution⁶²⁰. A similar relevance has been granted to the Strasbourg Court’s case law, whose judgments have been recalled by the Constitutional Court – even shortly after they had been issued⁶²¹ – with increasing frequency, not only with the aim to reinforce its own judicial reasoning but also to incorporate new meanings or interpretative criteria⁶²². Other international human rights treaties of particular importance for immigrant women that have been ratified by Spain and constitute therefore a standard of interpretation of constitutional provisions are the Convention for the Elimination of All Forms of Discrimination Against Women (ratified on 5 January 1984) as well as its Optional Protocol (ratified on 6 July 2001), the Convention for the Elimination of Racial Discrimination (ratified on 13 September 1968), the International Covenant on Economic, Social and Cultural Rights as well as the International Covenant on Civil and Political Rights (both ratified on 27 April 1977), and the European Social Charter (ratified on 6 April 1980). The Istanbul Convention, signed on 11 April 2011, is currently awaiting for ratification by the Spanish authorities, while Spain is neither a State Party of the International Labour Organization’s Domestic Workers Convention of 2011 nor of the UN International

⁶¹⁷ *Ibid.*, pp. 13 – 14.

⁶¹⁸ SAIZ ARNAIZ, A., *La Apertura Constitucional al Derecho Internacional y Europeo de los Derechos Humanos: el Artículo 10.2 de la Constitución Española*, Consejo General del Poder Judicial, Madrid, Spain, 1999, pp. 91 – 93.

⁶¹⁹ *Tribunal Constitucional (Sala Primera)*, sentencia no. 78 of 20 December 1982.

⁶²⁰ TORRES PÉREZ, A., ‘The Judicial Impact of European Law in Spain: ECHR and EU Law Compared’, 30(1) *Yearbook of European Law* (2011) 159, p. 160 ff.

⁶²¹ Saiz Arnaiz, A., *La Apertura Constitucional*, cit., p. 155 ff.

⁶²² Torres Pérez, A., ‘The Judicial Impact of European Law’, cit., p. 161.

Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1990.

The third key provision for the reception of supranational law in Spain is constituted by article 93 of the Constitution. Art. 93 establishes that “by means of an organic law, authorisation may be granted for concluding treaties by which powers derived from the Constitution shall be vested in an international organisation or institution” and that “it is incumbent on the *Cortes Generales* or the Government, as the case may be, to guarantee compliance with these treaties and with the resolutions emanating from the international and supranational organisations in which the powers have been vested”. While art. 93 was drafted with the implicit intention to regulate an eventual accession of Spain to the European Union – which eventually occurred in 1986 – the Constitutional Court rejected the idea of a resulting constitutional status of EU law on the grounds of this provision⁶²³. Instead, it distinguished between EU fundamental rights – which are ascribable under the scope of article 10(2) and must therefore constitute a standard of interpretation of constitutional rights – and EU law in general⁶²⁴. Although article 93 has been interpreted by the Constitutional Court as establishing a primacy of EU law over domestic law, and as granting them with a direct effect⁶²⁵, in case of contrast between these two sources an issue of constitutionality may not be raised. The conflict must be qualified as one between infra-constitutional norms, which will be resolved before ordinary courts by granting prevalence to EU law⁶²⁶. European Union law has also been consistently used by the Constitutional Court as an interpretative parameter of constitutional provisions, including those directly concerning fundamental rights⁶²⁷.

Moving on to the most relevant fundamental rights for immigrant women established by the Spanish Constitution, they can be divided in two main groups, i.e., those concerning family life and those more closely pertaining to employment – although the two categories inevitably

⁶²³ *Ibid.*, p. 165 ff.

⁶²⁴ *Tribunal Constitucional (Pleno)*, *sentencia* no. 28 of 14 February 1991, § 4. See also *Tribunal Constitucional (Sala Primera)*, *sentencia* no. 64 of 22 March 1991.

⁶²⁵ In addition to the cited judgments 28/1991 and 64/1991, see *Tribunal Constitucional (Sala Segunda)*, *sentencia* no. 130 of 11 September 1995, § 4.

⁶²⁶ See, for instance, *Tribunal Constitucional*, *sentencia* 28/1991, cit., § 4, clarifying that “it is one thing to envisage that the *Cortes* or the Government shall guarantee compliance with the Treaty of Accession and with European Union Law (...) and another thing [to conclude] that breaches of European Union Law by laws or provisions adopted after the Treaty of Accession imply *eo ipso* a breach of this final paragraph of article 93 of the Constitution, because (...) this provision simply indicates those state bodies which (...) are entrusted with guaranteeing compliance with European Union law” [translation mine].

⁶²⁷ PÉREZ TREMPES, P., ‘Constitución Española y Unión Europea’, 71 *Revista Española de Derecho Constitucional* (2004) 103, p. 116 ff.

overlap. In addition to discussing the fundamental rights enshrined in the Constitution, which may only be found in Chapters 1 and 2 of Title I, I will also refer to Chapter 3 of this Title. While indeed the provisions established in the latter may not be considered as establishing fundamental rights, they can still provide inspiration to judicial analyses in crucial areas for immigrant women's family life and employment.

Against the background of the complex constitutional status of immigrants in the Spanish order, two key constitutional provisions of general relevance are article 14, establishing the principle of formal equality, and article 9, focusing on substantial equality. On the one hand, article 14 provides that "*Spaniards* [emphasis mine] are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". Despite its literal reference to Spanish citizens, article 14 has been extensively recalled for non-citizens and immigrants, including immigrant women, confirming the general character of the principle of equality and non-discrimination as affirmed in the Spanish Constitution. The Spanish Constitutional Court indeed clarified that "the lack of a constitutional declaration proclaiming equality between foreigners and Spanish citizens is not, without a doubt, a sufficient argument in support (...) of the consideration that inequality of treatment between foreigners and Spanish citizens is constitutionally admissible, or even that the very claim of an issue of inequality between foreigners and Spanish citizens is constitutionally ruled out"⁶²⁸. The Court stressed in this respect the need to consider art. 14 in conjunction with "other provisions without which it not possible to determine foreigners' legal position in Spain"⁶²⁹, primarily art. 13. By doing so, it clarified that foreigners are recognised with a right to equal treatment with Spanish citizens in respect to all those rights which are essential for the guarantee of human dignity. On the other hand, article 9(2) provides that "it is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life".

Within the first two Chapters of Title I, several constitutional rights appear of particular importance for immigrant women in the field of family life. Article 18(1), which recognises the right to personal and family privacy, is the provision more strictly related to the right to family life. Another relevant fundamental right recognised by the Spanish Constitution

⁶²⁸ *Tribunal Constitucional, sentencia no. 107/1984, cit., § 3 of Legal Grounds* [translation mine].

⁶²⁹ *Id.*

concern the right to marry *ex* article 32. Such a right is recognised to men and women “with full legal equality”, and the regulation of the forms of marriage, the minimum age required, the grounds for separation and dissolution as well as their consequences is entrusted to law.

Moving on to Chapter III of the Constitution, Article 39(1) provides that public authorities have an obligation to “ensure the social, economic and legal protection of the family”. In relation to the issue of domestic violence, the right to life and to physical and psychological integrity, as well as the right to be free of inhuman or degrading treatment – all enshrined in article 15 – also appear of importance. Article 39(2) also recognises children with the right to obtain full protection by public authorities and to equality before the law irrespective of their parentage, granting the same right to mothers irrespective of their marital status. Furthermore, article 39(3) establishes that “parents must provide their children (...) with assistance of every kind while they are still underage and in other circumstances in which the law is applicable”, while article 39(4) establishes that children “shall enjoy the protection provided for in the international agreements which safeguard their rights”. Interestingly, article 39 envisages a special protection for mothers. While indeed paragraph 3 of this article establishes both parents’ duty to provide assistance to their children, only mothers and children are included under the scope of the right to full protection by public authorities envisaged by paragraph 2. This differential treatment has been condemned by some as discriminatory because it would grant a direct constitutional protection only to female parents⁶³⁰. However, others have rightly noted that such a special protection responds to the need to ensure substantial equality pursuant article 9 of the Constitution itself. As long as this special protection is not understood as burdening mothers with tasks that they should be able to share with their partners, it is indeed positive in that it recognises the mothers’ peculiar position both within and outside of the family and their resulting situation of inequality⁶³¹.

Lastly, the fundamental right to health protection is granted to all individuals by article 43, which also establishes at paragraph 2 an obligation for public authorities “to organise and safeguard public health”. When interpreted as also encompassing the right to reproductive health and to maternal health, the right to health constitutes a particularly significant right for women’s family life.

⁶³⁰ GARCÍA CANTERO, G., ‘Familia y Constitución’, in García de Enterría, E., *El Desarrollo de la Constitución Española de 1978*, Libros Pórtico, Zaragoza, Spain, 1982, p. 201.

⁶³¹ MARRADES PUIG, A. I., *Luces Y Sombras del Derecho a la Maternidad: Análisis Jurídico de su Reconocimiento*, Valencia University, Spain, 2002, p. 196.

In the field of employment, the Constitution envisages both collective and individual rights in the first two Chapters of Title I. Among the first group, it is possible to cite the right of association (art. 22), the right of unionisation as well as the right to strike (art. 28), and the right to collective bargaining (art. 37). In relation to individual rights, the key provision is constituted by article 35, which establishes that “all Spaniards have the duty to work and the right to employment, to free choice of profession or trade, to advancement through their work, and to sufficient remuneration for the satisfaction of their needs and those of their families”, adding that “under no circumstances may they be discriminated against on account of their gender”. Despite the explicit reference to Spanish citizens, immigrant workers are not excluded from the scope of article 35. They will indeed enjoy the constitutional right to work according to what is established by law, i.e., both by sources applicable to citizens and non-citizens alike and by those norms establishing specific rules for foreigners such as Spanish immigration law⁶³². The Spanish Constitutional Court has indeed qualified the right to work as one of the constitutional rights which “will belong or not to foreigners depending on whether treaties and law establish so, being thus admissible a differential treatment with Spanish citizens in relation to their exercise”⁶³³. On these grounds, the Constitutional Court has for instance admitted the possibility to establish regular residence as a prerequisite for foreigner to enjoy the right to work⁶³⁴. Incidentally, this discourse can also be extended to article 41 of the Constitution, which affirms the right to social security for “all citizens” – although in Chapter 3 of Title I⁶³⁵. In addition to this, the Constitutional Court has expressed the view that the right to work (together with other rights such as the right to health, to receive unemployment benefits, and with some limitations the right to reside in Spain) is included among those rights that may be restricted or limited by the legislator pursuant art. 13 of the Constitution, but whose content as determined by the Constitution or by international treaties signed by Spain may not be affected⁶³⁶.

Moving on to Chapter 3 of Title I, article 40(1) envisages an obligation for public authorities to “promote more favourable conditions for social and economic progress and for

⁶³² DÍAZ Y GARCÍA CONLLEDO, M., *Protección y Expulsión de Extranjeros en Derecho Penal*, La Ley, Madrid, Spain, 2007, pp. 271 -272. See also VALDUEZA BLANCO, M. D., *El Tratamiento Jurídico del Trabajo de los Extranjeros en España*, Lex Nova, Valladolid, Spain, 2008, p. 195 ff.

⁶³³ *Tribunal Constitucional, sentencia 107/1984*, cit., § 4 [translation mine]. For a thorough analysis of the constitutional right to work and of the inclusion of regular and irregular immigrants under its scope, see URIARTE TORREALDAY, R., ‘El Derecho al Trabajo y los Extranjeros Irregulares’, 78 *Revista de Derecho Político* 257 (2010).

⁶³⁴ *Id.*

⁶³⁵ GONZÁLEZ ORTEGA, S., *La Protección Social de los Trabajadores Extranjeros*, Ministerio de Trabajo y Asuntos Sociales, Gobierno de España, 2007, p. 19.

⁶³⁶ *Tribunal Constitucional, sentencia no. 236/2007*, cit., § 4. See also Rodríguez, C. M., Rubio Marín, R., ‘The Constitutional Status of Irregular Migrants’, cit., pp. 87 - 88.

a more equitable distribution of personal (...) income within the framework of a policy of economic stability” and encourages the pursuance of a policy of full employment. Article 40(2), on its part, establishes public authorities’ obligation to guarantee vocational training and retraining, workplace safety and hygiene, and adequate rest through the limitation of working days, periodic paid holidays and the promotion of suitable centres.

2. Spanish Immigration Law: an Overview

Due to my focus on regularly staying migrants, I will now move on to briefly analyse the baselines of the regime of entry and stay of foreigners as drawn by *L.O. 4/2000*. In addition to organic laws, another key source of Spanish immigration law is provided by regulations adopted for their implementation. A first regulation was adopted through *Real Decreto 2393/2004*⁶³⁷, which was repeatedly amended⁶³⁸ and ultimately repealed and replaced by *Real Decreto 557/2011*⁶³⁹.

Title II of the *L.O.* is based on the distinction between *estancia* (stay for a maximum period of 90 days) and *residencia* (residence), for which different permits are required. Focusing on residence permits, article 31 regulates “temporary residence”. Despite the qualification as temporary, this type of residence can be authorised from a minimum of 90 days to a maximum of five years. Residence authorisations for less than five years can be renewed. On the other hand, long-term residence – understood as a situation whereby foreigners are authorised “to reside and work in Spain indefinitely, in conditions of equality with Spanish citizens” is regulated by article 32.

Concerning temporary residence, art. 45 of *R.D. 577/2011* envisages different types of residence permits depending on the reasons for staying in Spain, i.e., residence permits for non-economic reasons (*residencia temporal no lucrativa*), for family reunification, residence

⁶³⁷ *Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*, BOE no. 6 of 7 January 2005.

⁶³⁸ Amendments were brought by *Real Decreto 1019/2006 (Real Decreto 1019/2006, de 8 septiembre, por el que se modifica al artículo 13 del Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, aprobado por Real Decreto 2393/2004, de 30 de diciembre*, BOE n. 28 of 23 September 2006) and by *Real Decreto 240/2007 (Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*, BOE no. 51 of 28 February 2007).

⁶³⁹ *Real Decreto 577/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por la Ley Orgánica 2/2009*, BOE no. 103 of 30 April 2011.

and work permits for dependent work, for research, for highly qualified workers holding an EU Blue Card, for fixed-term dependent work, for self-employment, for transnational providers of services and finally residence and work permits without an authorisation to work. Residence permits for exceptional circumstances are also crucial: pursuant art. 123 of *R.D. 557/2011* several categories of immigrants are granted with the possibility to access legal residence in Spain on the grounds, among others, of their integration and rootedness in the host country (*arraigo laboral, social or familiar*) and of being a victim of gender-based violence, regardless of their residence status.

While the ground rules for entry and stay in Spain on the grounds of a residence permit for family reunification are included in Title I on foreigners' rights and freedoms (arts. 16 – 19 of *L.O. 4/2000*), access to residence permits for work reasons is regulated under the heading of Title II, entitled to the legal regime of foreigners (*régimen jurídico de los extranjeros*, arts. 36 - 43). As to family reunification, the rules applicable to immigrant women entering and residing in Spain in the context of family migration will depend on whether their family member is a European Union citizen or a third-country national. In the latter case, articles 16 – 19 of the *L.O.* will apply. In the former instance, on the other hand, the provisions of *Real Decreto 240/2007* (implementing Directive 2004/38 in the Spanish legal order) will apply. Sponsorship of family reunification is open to both spouses and persons “maintaining a relationship akin to marriage” (art. 53 of *R.D. 557/2011*), and is subjected to requirements concerning minimum periods of residence in Spain as well as income and housing requirements – as is access to independent permits for reunited family members, as a general rule.

Moving on to the field of employment, a key general requirement for the validity of residence and work permits (which are generally issued simultaneously) is enrolment in the national social security system. Initial residence permits for the purpose of dependent work are limited in time and space, since they are valid for one year and will be linked to a specific occupation in a determined geographical area (art. 63 of *R.D. 557/2011*). The first admission of migrants for the purpose of work is linked to the national labour market situation in several ways. Firstly, applications for residence and work permits will be assessed in the light of a list of professions for which the availability of Spanish workers is low (*Catálogo de Ocupaciones de Difícil Cobertura*, prepared by the *Servicio Público de Empleo Estatal*), pursuant art. 38(1) and (2) of the *L.O.* Secondly, art. 38(2) of the *L.O.* also provides for the possibility to issue permits to migrant workers in professions not envisaged by the *Catálogo* in case of

insufficient availability of prospective Spanish workers in that area. Thirdly, the national labour market situation must be taken into account in another key procedure, i.e., the collective management of initial hiring (*gestión colectiva de contrataciones en origen*), regulated by art. 39 of the *L.O.* and by Title VIII of *R.D.* 557/2011. The collective management of hiring consists in the annual establishment of the number of positions which can be covered by workers who do not live or reside in Spain – requiring prospective employers to personally submit job offers pursuant art. 170(3) of *R.D.* 557/2011.

In respect to the anti-discrimination regime currently in force in Spain, this country has transposed the EU legal framework on this matter through two legal sources. As far as race discrimination is concerned, Directive 2000/43 was received in the Spanish legal order through law n. 62/2003⁶⁴⁰. This source, in addition to providing legal definitions of equality, direct and indirect discrimination, and harassment on the grounds of race and ethnic origin, envisaged specific provisions applying the principle of race equality in the field of employment. Accordingly, it reformed individual articles of the Spanish Workers' Statute⁶⁴¹ and of the Law of Labour Procedure⁶⁴², among other sources.

Moving on to sex discrimination, law n. 3/2007⁶⁴³ was considered by the Spanish Government as transposing Directive 2006/54 in the domestic order – although the law itself did not explicitly declare this⁶⁴⁴. Like law n. 62/2003, this source is also focused on implementing the principle of sex equality and non-discrimination in the field of employment, with a particular stress on the promotion of equal opportunities.

Immigrant women are explicitly mentioned by *Ley Orgánica* 4/2000 in three instances: in relation to the principle of equality between men and women, as victims of gender-based violence and as mothers. More specifically, equality between sexes is recalled by art. 2 as one of the principles Public Administrations must respect when exercising their competences in

⁶⁴⁰ *Ley n. 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social*, BOE no. 313 of 31 December 2003. It is worth mentioning that this law also transposed Directive 2000/78 in the domestic order.

⁶⁴¹ *Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*, BOE no. 75 of 29 March 1995.

⁶⁴² *Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral*, BOE no. 86 of 11 April 1995.

⁶⁴³ *Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*, BOE no. 71 of 23 March 2007.

⁶⁴⁴ European Network of Legal Experts in the Field of Gender Equality, *The Transposition of Recast Directive 2006/54/EC*, European Commission, 2009, available at http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf [last accessed on 19 March 2014], p. 96 ff.

the field of immigration, as well as by art. 2-*ter*(2) as one of the values that they must convey to immigrants in the context of formative actions aimed at their integration. Immigrant women victims of gender-based violence, on their part, are a category to which the *L.O.* grants a specific protection by granting them with the possibility to obtain a residence permit for exceptional circumstances (regulated mainly by art. 31-*bis* of the *L.O.*). Lastly, immigrant mothers receive a special protection during pregnancy in the sense that art. 57(6) and 58(4) prohibit the implementation of expulsion orders against pregnant women whenever this may imply a risk for the pregnancy or for the mother's health. An identical attitude is apparent in the provisions of *R.D. 557/2011*.

Immigrant women, however, experience a much wider range of issues and difficulties in Spain of which Spanish law is not always aware. As a consequence, apparently gender-neutral norms can produce a disparate impact on this category. While the specific protection of immigrant women during pregnancy and in case of gender-based violence is certainly appreciable, in other instances it is possible to observe serious gendered shortcomings in provisions of law applicable to this group⁶⁴⁵.

In paragraphs 3 and 4, I will therefore analyse problematic norms in the fields of family life and employment respectively, while exploring the influence of fundamental rights recognised in the Spanish legal order on such norms. In particular, I will consider specific provisions of Spanish immigration law, along with Spanish norms beyond immigration law that are nonetheless applicable and relevant to immigrant women. At the same time, I will analyse relevant judgments by higher and ordinary Spanish Courts with the ultimate aim of assessing whether and to what extent fundamental and human rights in force in the Spanish legal order have been able to correct the observed shortcomings, allowing immigrant women to fully enjoy their rights in the field of family life and employment.

3. Immigrant Women's Fundamental Right to Family Life: Problematic Provisions of Spanish Law

In relation to the fundamental right to family life, three main aspects of Spanish immigration law appear to be particularly interesting from a gendered point of view. The first concerns the

⁶⁴⁵ As I will show in greater detail in the following paragraphs, in the field of family life specifically, many of the observable gendered shortcomings of Spanish immigration law have been eliminated by legislative reforms that have dramatically increased the level of gender-sensitivity of relevant provisions in this area. I have nonetheless included these examples in my analysis because I am of the view that fundamental rights law played a decisive role in this process.

possibility for immigrant mothers to access residence rights on the grounds of their unpaid care work, and more specifically on the grounds of the care provided to their children. A second key issue relates to immigrant women's access to sponsorship for family reunification with family members versus the emphasis of the Spanish legal system on economic prerequisites. Lastly, an interesting matter is constituted by the evolution of Spanish law as to the intensity of the protection offered to immigrant women victims of domestic violence. While the first two aspects have been chosen because of the availability of compelling judicial examples of fundamental rights-based interpretation of particularly crucial norms for immigrant women's family life, the influence of fundamental rights in relation to protection against domestic violence will be discussed from a more legislative point of view.

In all of these three cases, the applicable provisions of Spanish law have evolved from an initial gender-blindness to a stronger sensitivity to immigrant women's specific difficulties and issues. The newly reformed rules still do not specifically mention women. However, the risk of perverse effects for this category – which was in my view significant in the past – has been considerably reduced. Interestingly, in all three instances these reforms incorporated principles that had been previously established at judicial level on the grounds of domestic and supranational fundamental rights law, suggesting a process whereby both judges and legislators are steering towards the same direction. In this section, I will therefore discuss the role played by fundamental rights law in significant judicial examples in the sense of prompting a more gender-sensitive interpretation of biased norms of Spanish law, anticipating normative reforms of these sources. On the other hand, I will also enquire into the persisting shortcomings of current norms of Spanish law as well as of domestic case law in sensitive areas of immigrant women's family life.

a. From the Exception to the Rule: Immigrant Mothers' Access to Residence Rights on the Grounds of Childcare

At present time, *R.D. 557/2011* grants third-country national parents with the possibility to acquire a residence permit on the grounds of being a parent to a child with Spanish citizenship. In particular, art. 124(3)(a) establishes that residence permits for *arraigo familiar* will be issued to “fathers or mothers of a minor with Spanish citizenship, if the latter is in the care of the applicant parent and lives with him or her, or if the parent fulfils his or her parental obligations towards the child”. Before 2011, however, neither the regulation of *arraigo* nor any other provision of the previously in force *R.D. 2393/2004* admitted this possibility. In

fact, for the purpose of obtaining a residence permit for *arraigo*, art. 45(2)(b) of *R.D.* 2393/2004 only considered being a parent as a relevant feature insofar as it was combined with other prerequisites consisting in a minimum period of residence of three years, a clean criminal record – both in Spain and in the country of origin, and a signed employment contract for a minimum duration of one year. On the other hand, this provision did not restrict the possibility to obtain a residence permit for *arraigo* only to parents of Spanish citizens, but it extended it to parents of all children.

In any case, the strict and numerous requirements in the old regulation of *arraigo* made it particularly difficult for third-country national mothers to obtain residence permits on the grounds of the care provided to their children. This regulation required them to work and care for children at the same time, which was arguably more difficult for them both as mothers and as migrants because of the described difficulties experienced by this category in accessing the Spanish labour market and in reaching a satisfying work/family balance. As a consequence, immigrant women in Spain pursuing residence permits on the grounds of their unpaid care work resorted to attempt a different legal strategy, applying for residence permits on the grounds of art. 31(3) of the *L.O.* This provision, indeed, not only grants the possibility to obtain “a temporary residence permit for *arraigo*, for humanitarian reasons, for reasons of collaboration with justice” but contains a final open clause adding “or in other exceptional circumstances which will be determined by regulations”.

The “other exceptional circumstances” clause was repeatedly relied on by immigrant women pursuing residence permits on the grounds of motherhood, but many requests were rejected by the Spanish authorities. This gave rise to a consistent number of applications before domestic courts by third-country national immigrant women arguing that the refusal to grant them a residence permit breached their fundamental rights in the field of family. I am of the view that the case law that followed is extremely interesting not only because it constitutes a fitting example of how fundamental rights can positively influence gender-blind norms of immigration law and correct their gendered shortcomings. These fundamental rights-based judicial interpretations, indeed, brought Spanish courts to establish principles which anticipated a legal reform that ultimately recognised immigrant women’s right to access residence rights purely on the grounds of unpaid care work, without any further requirements⁶⁴⁶.

⁶⁴⁶ Fundamental rights and freedoms established both at European and domestic level were also recalled by Spanish courts when interpreting article 2(d) of *R.D.* 240/2007, regulating ascendants’ access to residence permits for family members of Union citizens, as not requiring a dependence of the former from the latter– see

One of the earliest traceable judgments on this matter was pronounced by the *Tribunal Superior de Justicia* of the Basque Country in 2007⁶⁴⁷. The case concerned an Ecuadorian mother living in Spain with her Spanish citizen daughter. The mother had applied for a residence permit for exceptional circumstances *ex art.* 31(3) of the *L.O.* on the grounds of being the parent of a Spanish child. Both the Spanish authorities and the lower administrative court⁶⁴⁸ had assessed that she did not satisfy the minimum requirements for obtaining a residence permit as established by art. 45 of *R.D.* 2393/2004. First and foremost, the rejection had been based on the consideration that the applicant mother had not been residing in Spain for a minimum of two or three years as required by art. 45, and that this prerequisite had to be preliminarily ascertained before examining the presence of all the other requirements established by this provision. Secondly, the competent authorities argued that the applicant mother relied on social assistance benefits that did not even amount to the minimum wage.

Before the *Tribunal Superior*, the applicant mother stressed that she had not applied for a residence permit for *arraigo* pursuant art. 45 of *R.D.* 2393/2004, but rather for a residence permit for exceptional circumstances *ex art.* 31(3) of the *L.O.* More specifically, she argued that the expression “other exceptional circumstances” used by art. 31(3) could not be understood as being exclusively regulated and specified by art. 45 of the *R.D.*, and that being the mother of a Spanish child could well be interpreted as constituting another exceptional circumstance, besides the *arraigo*, that could justify the granting of a permit for initial

for instance *Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección 1ª)*, judgment no. 935 of 3 July 2008; *Tribunal Superior de Justicia de Castilla Y León, Burgos (Sala de lo Contencioso Administrativo, Sección 1ª)*, judgment no. 383 of 18 July 2008; *Tribunal Superior de Justicia de Castilla-La Mancha (Sala de lo Contencioso-Administrativo, Sección 1ª)*, judgment no. 252 of 26 November 2012. While such an interpretation was also positive, in that it allowed third-country national mothers of Spanish citizens to obtain a residence permit as a family member of an Union citizen, the corresponding judgments are less interesting for our purposes than the case law on residence permits for exceptional circumstances. In the case of *R.D.* 240/2007, indeed, the norm at issue was not specifically problematic for immigrant women because it did not impose requirements which were disproportionately difficult to comply with for this category (such as the prerequisite of carrying out productive and reproductive work at the same time), nor was it reformed as a consequence of the fundamental rights-based case law concerning its provisions. Incidentally, it should be noted that while the Italian law receiving Directive 2004/38 in the domestic order (*d.lgs.* 30/2007) explicitly extended its provisions to family members of Italian citizens not exercising freedom of movement, a similar extension to purely internal situations and thus to family members of Spanish citizens was carried out in Spain by the Supreme Court in 2010 (*Tribunal Supremo, Sala 3ª, de lo Contencioso-Administrativo, sentencia* of 1 June 2010, application no. 114/2007).

⁶⁴⁷ *Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso Administrativo, Sección 3ª)*, *sentencia* no. 237 of 19 April 2007.

⁶⁴⁸ *Juzgado de lo Contencioso- Administrativo n. 1 de Vitoria-Gasteiz, sentencia* no. 287 of 30 June 2006.

residence. Importantly, the applicant mother also noted that the previous judgment had “disregarded all international agreements which refer to the right to family life”⁶⁴⁹.

In order to resolve this issue, the Tribunal did not merely refer to previous jurisprudence establishing that the provisions of art. 45 of *R.D.* 2393/2004 neither constituted the only specification of art. 31(3) of the *L.O.*, nor did it enjoy an exclusive role in this sense. What is more interesting for our purposes is that the Tribunal also relied on the European Court of Justice’s case law and on its interpretation of the fundamental rights and freedoms of Union citizens. In particular, the *Zhu and Chen* judgment⁶⁵⁰ was extensively cited by the Tribunal and played a key role in its judicial reasoning. Firstly, the Tribunal embraced the applicant mother’s statement whereby she had applied for a residence permit not on the grounds of *arraigo*, but rather on the grounds of being the parent of a Union citizen child. Secondly, the Tribunal observed that while this circumstance was not expressly envisaged by the *R.D.*, art. 31(3) could have a direct application to the case at issue. This argumentation was grounded, in the Tribunal’s view, on “the freedom of movement and of residence of the minor Spanish citizen recognized by article 19 of the Spanish Constitution”⁶⁵¹, as well as on “the protection of Spanish children’s right to family life established by article 18(1) of the Spanish Constitution”⁶⁵². The fact that this constitutional right demanded a direct application of art. 31(3) was further corroborated by the ECJ’s reasoning in *Zhu and Chen*, since “the refusal to allow a third-country national parent to reside with a Spanish minor would deprive of any useful effect both the minor’s right to reside in Spain and his or her right to family life”⁶⁵³.

Another compelling aspect of the Tribunal’s reasoning concerned the State’s obligation to allow the applicant mother to work. Indeed, the judgment stated that “the consequences of the refusal to allow a third-country national parent residing with a Spanish minor would include a violation of article 14 of the Spanish Constitution”⁶⁵⁴, i.e., of the principle of equality and non-discrimination, since by denying a residence permit, the Spanish authorities would implicitly deny the mother the possibility to enter the national labour market. As a consequence, “a category of Spanish minors, illegitimately discriminated due to the

⁶⁴⁹ *Tribunal Superior de Justicia del País Vasco*, sentencia no. 237/2007, cit., § 2 of Legal Grounds. For the purposes of this chapter, the English translation of all the excerpts from Spanish judgments should be understood as mine unless otherwise specified.

⁶⁵⁰ Case C-200/02, *Zhu and Chen*, cit.

⁶⁵¹ *Tribunal Superior de Justicia del País Vasco*, sentencia no. 237/2007, cit., § 7 of Legal Grounds. Art. 19 of the Spanish Constitution recognises Spanish citizens’ right to freely choose their place of residence and to circulate within the national territory, as well as their right to freely enter and leave Spain subject to the conditions established by the law.

⁶⁵² *Tribunal Superior de Justicia del País Vasco*, sentencia no. 237/2007, cit., § 7 of Legal Grounds.

⁶⁵³ *Id.*

⁶⁵⁴ *Id.*

impossibility of the ascendants in charge of their care to access the labour market, would be created”⁶⁵⁵ and this would “deprive, *ab initio*, a minor child with the possibility of freely developing his or her personality in conditions of equality with Spanish minors whose ascendants enjoy access to the labour market”⁶⁵⁶.

Against this background, the Tribunal concluded that the legal recognition of the applicant’s mother situation was coherent with the constitutional guarantee of equality and non-discrimination established by art. 14 with respect to Spanish minors. Therefore, it recognised the mother’s right to obtain a residence permit for exceptional circumstances on the grounds of being the parent of a Spanish child. In sum, this judgment rested on three pillars – all related to the Spanish child’s fundamental rights: the right to family life, the right to freedom of movement and residence and the right to equality (respectively *ex* arts. 18, 19 and 14 of the Constitution). Interestingly, these fundamental rights of the child also prompted the indirect recognition of the mother’s fundamental right to family life and to work.

The observed judicial reasoning was reproduced in a consistent number of judgments by *Tribunales Superiores de Justicia*⁶⁵⁷. Interestingly, when similar applications were submitted by third-country national mothers before the *Audiencia Nacional*, this court chose to disregard their fundamental rights-based argumentations in favour of a judicial reasoning based on systematic interpretation in order to conclude for the indeterminate and open character of the concept of “exceptional circumstances”. That was the case, for example, of a 2011 judgment⁶⁵⁸ where the *Audiencia* avoided embarking on an analysis of a Cuban mother’s claim whereby the refusal to grant her with a residence permit for exceptional circumstances violated the constitutional obligation to social, economical and legal protection of the family as well as her and her Spanish son’s right to protection *ex* art. 39 of the Spanish Constitution. A similar attitude was already observable in two 2009 judgments where the applicant

⁶⁵⁵ *Id.*

⁶⁵⁶ *Id.*

⁶⁵⁷ Before 2011, a similar reasoning can be found in *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª)*, sentencia no. 617 of 6 October 2008; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª)*, sentencia no. 787 of 26 November 2008; *Tribunal Superior de Justicia de Galicia (Sala de lo Contencioso-Administrativo, Sección 1ª)*, sentencia no. 419 of 20 May 2009; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 829 of 17 December 2009; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 848 of 28 December 2009.

⁶⁵⁸ *Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª)*, sentencia of 10 November 2011, application no. 396/2010.

mothers' claims of violation of their and their children's fundamental rights under articles 10, 13, 14, 18 and 39 of the Spanish Constitution remained unaddressed⁶⁵⁹.

In any case, judicial decisions by *Tribunales Superiores de Justicia* on the matter became particularly frequent around 2011, when *R.D. 557* explicitly introduced residence permits for third-country national parents of minor Spanish children, recognising that parenthood is in itself sufficient to suggest the existence of *arraigo familiar* without any further requirements. Importantly, even after the adoption of *R.D. 557/2011*, fundamental rights continued to play a prominent role in Spanish courts' reasoning. In fact the latter considered the *R.D.* as a mere confirmation of the interpretation of the norms at issue, which was demanded by fundamental rights both at the constitutional and European level⁶⁶⁰.

In addition to the right to family life *ex art. 18(1)* and to the principle of equality and non-discrimination *ex art. 14*, other fundamental rights protected by the Spanish Constitution were also relevant in this case law. Among them, parents' duties and rights as established by art. 39(3) were repeatedly recalled by Spanish Courts. For instance, in a case concerning the refusal to issue a residence permit for exceptional circumstances to a third-country national mother of a Spanish child due to her criminal record, the *Tribunal Superior de Justicia* of Castilla y León⁶⁶¹ considered that "the fact that the applicant is the mother of a minor with Spanish citizenship produces extremely complex consequences, because in our legal order parents' rights and duties (...) towards their children are established"⁶⁶². The Tribunal then proceeded to recall parents' constitutional obligation to provide their children with assistance of any kind *ex art. 39(3)*, and stressed that such rights and duties relate to a wide variety of international treaties establishing similar rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights and of course the UN Convention on the Rights of the Child). In this light, the Court concluded that refusal to grant a residence permit to the mother "gives rise to a clear tension between the administration's decision (...) and the relationship between the applicant and her minor

⁶⁵⁹ *Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª)*, sentencia of 13 May 2009, application no. 262/08, and *Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª)*, sentencia of 10 June 2009, application no. 272/08.

⁶⁶⁰ See for instance *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª)*, sentencia no. 86 of 2 February 2011; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 940 of 24 November 2011; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 805 of 4 December 2012; *Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 235 of 9 April 2013.

⁶⁶¹ *Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 3ª)*, sentencia no. 2199 of 8 October 2010.

⁶⁶² *Ibid.*, § 3 of Legal Grounds.

Spanish daughter, presenting mother and daughter with a veritably diabolic alternative (...): the mother, and only her considering the young age of the daughter, will be forced to decide between depriving her Spanish child of the right to grow up and receive an education on the territory of her own country, to which she has a right that cannot be derogated (...), or to fail to fulfil her motherly obligations to support and educate her child, being prevented from working, and to part from her”⁶⁶³.

The analysed case law constituted an important playing field where fundamental rights recognised by the Constitution were combined with the fundamental rights and freedoms of Union citizens as interpreted by the European Court of Justice, as well as with European and international human rights law. This combination provided a vital support for the applicant mothers’ claims, strengthening Spanish courts’ extensive interpretation of gender-blind norms on the grounds of a fundamental rights discourse. As a result, immigrant women were no longer requested to perform productive and reproductive care at the same time in order to enjoy family life with their children in Spain, and the indirect discrimination implied in this legal requisite was eliminated.

However, the extensive reliance on European citizenship resulted in a case law and later in a legislative reform that only partially recognised immigrant women’s needs and difficulties by restricting the possibility to obtain residence permits to parents of Union citizen children. In this sense, I would argue that the influence of fundamental rights at constitutional, European and international level only prompted a half-victory for immigrant mothers residing in Spain. This result is not imputable to Spanish courts’ decision to focus on fundamental rights and freedoms of Union citizen children, but rather on the structural features of the Spanish constitutional system. In particular, I have shown that the Spanish Constitutional Court has restricted the scope of the right to equality and non-discrimination between Spanish citizens and foreigners only to those fundamental rights which are essential to human dignity, admitting the possibility of a differential treatment and of restrictions to the enjoyment of other constitutional rights – including the right to family life as established by articles 18 and 39 of the Spanish Constitution – for foreigners, who will be able to access said rights depending on what is established by treaties and by the law. Therefore, even if the Spanish Courts had relied less on Union citizens’ fundamental rights and freedoms and more on constitutional provisions recognising a general right to family life, a differential treatment

⁶⁶³ *Id.* An identical reasoning was used by the same Tribunal in its subsequent *sentencia* no. 1549 of 24 June 2011.

between third-country national mothers depending on the citizenship of their children may have still been established. Thus it must be concluded that, regrettably, while fundamental rights had an extremely positive influence on the situation of third-country national mothers of Union citizens, it left that of the mothers of third-country national children unchanged. To this day, the latter group is still forced to comply with requirements that are disproportionately difficult to fulfil for immigrant mothers in general. In order to obtain a residence permit on the grounds of the care provided to their children, such mothers must indeed to satisfy the requisites established by art. 124(2) of *R.D. 557/2011* for residence permits for *arraigo social*, i.e., they will also have to demonstrate that they hold a clean criminal record and an employment contract for the duration of at least one year.

The fundamental rights-based interpretation promoted by Spanish courts also presents specific gendered shortcomings. As I have already stressed in chapter II when analysing the ECJ's case law on this very matter (*Carpenter*⁶⁶⁴, *Baumbast and R.*⁶⁶⁵, *Zhu and Chen*⁶⁶⁶, *McCarthy*⁶⁶⁷, *Dereci*⁶⁶⁸ and *O. and S.*⁶⁶⁹), establishing that immigrant mothers' residence rights are strictly linked to the usefulness of their reproductive and care work for Spanish children's exercise of their own fundamental rights and freedoms arguably constitutes a double-edged sword for third-country national women. On the one hand, the judicial and normative recognition of unpaid care work within the household as an activity with intrinsic importance for the exercise of their fundamental rights and freedoms, and as an autonomous and self-sufficient ground for the mother to obtain residence rights, certainly constitutes a positive result. On the other hand, however, creating such a route of access to residence rights also shifts the normative focus from mothers to children, and fails to offer any long-term guarantees to immigrant women who obtain these type of permits. In other words, even those immigrant women enjoying more favourable legal treatment do so merely on the grounds of being caretakers of Union citizens, and they risk losing that privileged status once their care is no longer needed. And, indeed, article 130 of *R.D. 557/2011* establishes that residence permits for exceptional circumstances, precisely because of their exceptional character, are only valid for one year, and may be renewed only provided that "the competent authorities

⁶⁶⁴ Case C-60/00 *Carpenter*.

⁶⁶⁵ Case C- 413/99, *Baumbast and R.*, cit.

⁶⁶⁶ Case C-200/02, *Zhu and Chen*, cit.

⁶⁶⁷ Case C-434/09, *McCarthy*, cit.

⁶⁶⁸ Case C-256/11, *Dereci et al.*, cit.

⁶⁶⁹ Joined cases C-356/11 and C-357/11, *O. and S.*, cit.

ascertain that the reasons for its granting persist”. Conversely, immigrant mothers are confined to fulfilling the role of carers for as long as they are “needed”, as stated by art. 130(2) whereby “only in case the authorities conclude that the reasons motivating the granting of the permit ceased to exist, [holders] may apply for a residence permit or a work and residence permit”. The latter norm is arguably central in making residence rights conditional on the continuous performance of unpaid care work, thus enforcing a rigid distinction between productive and reproductive work within the family. A preferable solution in this sense may be that of allowing holders of these exceptional permits to also apply for other permits, including work and residence permits, even if at the time of expiration the reasons justifying their initial granting remain. By doing so, immigrant women would at least be allowed to progressively build other grounds for their residence rights and to avoid the risk of losing their residence permits once their care is no longer necessary for their spouses or children.

In conclusion, constitutional and European fundamental rights certainly played a vital role in prompting a more extensive interpretation of Spanish immigration law, which allowed immigrant women to access residence permits on the sole grounds of their unpaid care work within the household – a possibility that was previously precluded to them. The successful results that ensued were however limited to a specific group of immigrant women, i.e., mothers of Spanish children. In addition to this, the ambivalent character of framing residence rights as purely derivative from the enjoyment of others’ rights and freedoms, which was observed in the ECJ’s case law, was reproduced in Spanish judgments. I would therefore argue that the certainly remarkable influence of fundamental rights on the initially gender-blind norms of Spanish immigration law in this specific matter produced quite mixed results.

b. Immigrant Women Versus Income-Based Rules on Sponsorship of Family Reunification

Immigrant women in Spain pursuing to sponsor family reunification with family members left behind encounter one common issue that has been observed both at supranational and at domestic level, in relation to European and Italian immigration law respectively. This issue involves the possible contrasts between immigration rules focused on financial prerequisites for sponsoring family reunification and the reality of their situation, characterised by a concentration in the worst sectors of the labour market and by disproportionate care burdens within the family – both in comparison to citizen women and to migrant men. As I have

shown in the introduction to this chapter, immigrant women in Spain are not immune to the risk of being unable to comply with the income requirements imposed by immigration law for family reunification, particularly so after the beginning of the economic crisis.

In fact, minimum economic requirements appear to play quite an important role in Spanish rules on family reunification. Art. 18 of *L.O. 4/2000* allows a regularly resident foreigner to sponsor family reunification provided that he or she has obtained the renewal of their initial residence permit and, pursuant its paragraph 2, that he or she “has adequate housing and sufficient economic means to provide for his or her needs as well as those of his or her family, once reunited”. Art. 54(1) of *R.D. 557/2011* clarifies that sufficient economic means for sponsoring family reunification amount to a monthly 150% of the IPREM⁶⁷⁰ in case of families with two members (including the sponsor and the reunited family member), together with a monthly 50% of the IPREM for each additional family members in families with more than two members. Furthermore, art. 54(2) establishes that residence permits for the purpose of family reunification “will not be issued if it is ascertained beyond any doubt that there is no prospect of maintaining the economic means during the year following the submission of the application” and that this prospect “will be assessed by taking into consideration the evolution of the sponsor’s means for the six months preceding the date of submission of the application”. Such a focus on economic requirements and financial stability of income can produce a disparate impact on immigrant women, whose employment situation is more precarious and rewarded less than that of their male counterparts.

However, *Ley Orgánica 2/2009* introduced an important change in the regulation of family reunification, reforming art. 18 of *L.O. 4/2000* in the sense of allowing for the possibility to consider the entire family’s financial resources for the purpose of assessing the compliance with the economic requirements established by this very provision. In particular, after the reform art. 18(2) of the *L.O.* provides that “in the assessment of the income for the purpose of reunification, that coming from the social assistance system will not be considered, while other income brought by the spouse residing in Spain and cohabiting with the sponsor will be taken into account”. The restriction to the cohabiting spouse as the only family member allowed to contribute to the compliance with economic requirements for the purpose of family reunification was subsequently eliminated by art. 54(4) of *R.D. 557/2011*. This provision confirms the impossibility to count social assistance benefits among the financial resources

⁶⁷⁰ The IPREM, or *Indicador Público de Renta de Efectos Múltiples*, is a financial index determined every year by a Financial Law (*Ley de Presupuestos Generales del Estado*) and used as a reference to assign social assistance benefits and subsidies that depend on income. For the year 2014, law n. 22 of 23 December 2013 (*BOE* no. 309 of 256 December 2013) has fixed the monthly IPREM at 532.52 Euros.

relevant for this purpose, but also states that economic means in this context can include “those brought by the sponsor’s spouse or partner, as well as by any other direct family member of first degree, provided that he or she resides in Spain and cohabits with the sponsor”.

Art. 54(4) of R.D. 557/2011 recalls an analogous provision established by Italian immigration law. More specifically, art. 29(3)(b) of the *Testo Unico Immigrazione* similarly provides that “for the purpose of determining income, the total yearly income of the family members living together with the person applying for family reunification must also be taken into consideration”. The criterion of cohabitation is indeed adopted by both Spanish and Italian law in order to assess the individuals admitted to contributing to the satisfaction of economic thresholds for accessing family reunification.

This type of provision is particularly positive for immigrant women, because it appears to reach a balance between the state’s need to ensure that the reunited family members will not become a burden for the national social assistance system and the sponsor’s right to enjoy family life in the host country with his or her family members – an aspiration that may be disproportionately curbed for women. Similar norms perform a symbolic disestablishment of the one breadwinner model, marking an important step towards ensuring immigrant women’s equal enjoyment of their fundamental right to family life. In my commentary on Italian case law on the matter, I observed that in some instances fundamental rights recognised by the Constitution were able to push immigrant women’s enjoyment of their right to family reunification even further by allowing those entirely devoted to reproductive and care work within the household to sponsor family reunification. In the examined judgments, Italian courts indeed relied on fundamental rights to argue that even in cases where immigrant mothers were not performing any kind of employed activity, they could still sponsor family reunification because their contribution to households where other family members were in charge of performing productive work could not be qualified as inactivity. Just like Italian rules on the matter, the described norms of Spanish immigration law appear to neither decisively deny nor explicitly admit this possibility. Regrettably, the specific case of immigrant women entirely devoted to unpaid reproductive work does not appear to have been brought to the Spanish courts’ attention.

However, this does not mean that interesting cues for assessing fundamental and human rights’ role in expanding immigrant women’s possibility to sponsor family reunification may

not be extracted from domestic judgments on legal prerequisites based on income. In judgment 1258/2012⁶⁷¹, the *Tribunal Superior de Justicia* of Castilla y León examined the case of a Colombian mother whose application for a residence permit for family reunification on behalf of her children had been rejected on the grounds that she had not shown that she had sufficient economic means to support the whole family pursuant the rules in force at the time, i.e., art. 42(2)(d) of R.D. 2393/2004⁶⁷². Interestingly, the applicant mother argued that pursuant art. 54(4) of R.D. 557/2011 – entered into force pending the judicial controversy, both her and her partner’s income should have been taken into consideration. More specifically, she submitted that although her partner was not the biological father of the children with whom she sought reunification, he contributed to their support as well as to that of their common child through his unemployment benefits. Even more importantly, on these grounds the applicant mother lamented a breach of the constitutional principle of protection of the family enshrined in art. 39 of the Constitution. The Tribunal, however, considered that no violation of this constitutional right had occurred. Indeed, the applicant had only proved a monthly salary of 700 Euros for her employment as a domestic worker and her partner’s income could not be taken into account because it consisted of social assistance benefits. The fundamental right to protection of the family was thus not able to prompt a more favourable interpretation for the involved applicant mother. In fact, the Tribunal assessed that the discussed economic requirements precisely had the aim of protecting the family from economic difficulties in the host country, and to “avoid exposing the rest of the family to certain adverse circumstances in the host country that could first and foremost undermine the personal development of minors in an unknown country and to which they are not linked in any way besides by the will of the sponsor to bring them there”⁶⁷³.

Assessed almost contemporarily to judgment no. 1258/2012, and by the same Tribunal, was a case where fundamental rights conversely prompted a positive and extensive interpretation of the rules at issue. Judgment no. 378/2012⁶⁷⁴, indeed, concerned the rejection of another Colombian mother’s application for a residence permit for the purpose of family

⁶⁷¹ *Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 1258 of 22 June 2012.*

⁶⁷² Art. 42(2)(d) of R.D. 2393/2004 required a “certification of employment and/or sufficient economic means to attend to the family’s needs” and assigned the executive power with the task to determine the exact quantity of “life means that can be required to this effect”.

⁶⁷³ *Ibid.*, 2 of Legal Grounds.

⁶⁷⁴ *Tribunal Superior de Justicia de Castilla Y León, Burgos (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 378 of 20 July 2012.*

reunification, which she had submitted on behalf of her son. The reason for this rejection, in addition to the fact that the mother had not transferred money or supported the child in a way that suggested an economic dependence, was once again that the applicant had not shown that she had sufficient economic means pursuant art. 18(2) of the *L.O.* More importantly, the Spanish authorities and the administrative court assessing her case had rejected as irrelevant the applicant's submission that her adult children contributed to the family's finances with their salaries. At the time of the rejection of the application, indeed, R.D. 557/2011 had not introduced the explicit possibility of taking into account other family members' income for the purpose of satisfying economic requirements for accessing family reunification, and art. 18 of the *L.O.* explicitly referred only to the husband's income. The appealed decision of the administrative court had therefore adopted a restrictive interpretation of the involved norms of Spanish immigration law, considering that the adult children's income could not be taken into account because the latter were not the ones sponsoring family reunification and had not undertaken any obligation to provide a certain sum to their minor brother. At most, their income could have played a positive role in so far as it would prove that they did not constitute an additional economic burden for the family.

Before the *Tribunal Superior de Justicia*, the applicant mother contested this judicial view of the family as a fragmented sum of individually considered persons, rather than as a whole and organic entity to the sustenance and functioning of which all members collaborate. She considered that in her case "neither a joint and comprehensive analysis of the family unit of the sponsor, nor of dependent family members' ability to work, nor of the actual economic capacity of said unit, had been carried out, due to the exclusion of [her] husband's and two son's income"⁶⁷⁵. Furthermore, she argued that "the cohabitation of multiple persons under the same roof creates a presumption that this entails a sharing of expenses and burdens, when also two adult children of the sponsor taken on the sharing of said expenses"⁶⁷⁶. Even more importantly, the applicant mother recalled the "constitutional principle of protection of the family and of the minor for which reunification is pursued"⁶⁷⁷, submitting that in the light of her family's situation this principle was sufficient to ground the granting of the residence permit for family reunification.

Against this background, the Tribunal observed that while at the time of the mother's application art. 18(2) of the *L.O.* and art. 42 of *R.D.* 2393/2004 did not explicitly admit the

⁶⁷⁵ *Ibid.*, § 2 of Legal Grounds.

⁶⁷⁶ *Id.*

⁶⁷⁷ *Id.*

possibility to consider other family members' income besides that of the husband, neither did they explicitly rule it out. In fact, this possibility was subsequently admitted by art. 54 of *R.D.* 557/2011, which the court referred to merely as an interpretative aid. With respect to the issue of the mother's satisfaction of the financial prerequisites, the Tribunal importantly stated that "the minimum doubts that in this case may exist should have been assessed in favour of the right of the minor and also in favour of the right to family life recognised to this minor, to the sponsor, to her husband and to their four children"⁶⁷⁸. In this light, the constitutional right to family life of the involved persons prompted a judicial interpretation of the family in a more organic sense than that carried out by the previous judicial and executive authorities. Indeed, the Tribunal considered the applicant mother's family as "a fully organised and structured family unit with an actual rootedness in Spain that pursues, as it is logical, to be joined in Spain by the minor son of [the applicant's husband] with the firm aim of realising the right to family life of this unit"⁶⁷⁹. Therefore, the Tribunal concluded that the Spanish authorities' rejection of the mother's application was illegitimate due to the refusal to include the adult children's income in the assessment of the compliance with the minimum economic threshold as referred to by art. 18 of the *L.O.*

Against this background, it can be observed that the fundamental right to protection of the family and to family life as enshrined in art. 39 of the Constitution was not able to ground the possibility to consider social assistance benefits as relevant for the purpose of complying with income requirements established by rules on family reunification. After all, the explicit exclusion of this possibility by the reform introduced with *L.O.* 2/2009 did not leave any margin of appreciation in this sense. However, the constitutional principle of protection of the family was far from ineffective in promoting a less restrictive interpretation of the Spanish family reunification regime. What is more, I would argue that such an interpretation might offer further perspectives of development from a gendered point of view.

It is extremely significant that the fundamental right to family protection grounded a different judicial view of the family – as a whole to which every family member contributes rather than as the mere sum of individually considered persons. Embracing this legal view and establishing that the constitutional right to family protection requires immigration law to be interpreted accordingly is particularly important for immigrant women. In judgment no. 378/2012, this meant that the applicant – a mother of four with three different jobs as

⁶⁷⁸ *Ibid.*, § 6 of Legal Grounds.

⁶⁷⁹ *Id.*

domestic worker with a total salary of 1,300 Euros per month – could rely on the economic contributions of her adult sons as well as that of her husband, instead of having to show that she could support her entire family by herself. In addition to this, I would argue that a similar positive effect could have been produced in a case where the immigrant mother would be entirely devoted to reproductive and care work while other family members contributed to the family's well-being through productive, paid work. Because the Tribunal's conclusions in this case were strictly linked to its consideration of the family as a whole, and on the constitutional obligation to protect it as such, a similar outcome could have been reached where the sponsor's share consisted in performing unpaid care work within the family. Undoubtedly, it would be difficult to maintain that a fundamental-rights based interpretation of Spanish rules on family reunification could or even should support the elimination of economic prerequisites altogether. As clarified by the *Tribunal Superior de Justicia* in its judgment no. 1258/2012, requiring a minimum economic capacity of the sponsor does not simply respond to the need to ensure that the reunited family members will not weigh on the host country's social assistance system. It also aims to allow said family members to enjoy a minimum level of wellbeing in the host country – an aim that is ascribable to the State's constitutional obligation to protect all families.

Nonetheless, I would argue that requiring sponsors to show their capability to support reunited family members by themselves through strictly economic prerequisites is not the most effective way to achieve this goal. Not only do such requirements produce the perverse effects of indirectly discriminating against immigrant women in their enjoyment of the right to family reunification, but they are also based on the shortsighted assessment of wellbeing as being a purely financial matter.

In this sense, the observed positive influence of the constitutional right to family life in judgment no. 378/2012 constitutes a meaningful example of the transformative power of fundamental rights law at domestic level. This decision suggests the potential of fundamental rights-based judicial analyses such as that carried out by the Tribunal not only to accommodate immigrant women workers' needs and respond to their disproportionate difficulties, but also to acknowledge the value of reproductive and care work conducted within the household as a contribution to the socio-economic wellbeing of family units where other family members take on paid employment. Because this burden at present time disproportionately falls on women, this may also constitute a particularly favourable development for female third-country nationals' access to sponsorship of family reunification in conditions of equality and non-discrimination with their male counterparts.

In sum, the influence of fundamental rights in the field of immigrant women's access to family reunification is not evident on an extensive scale. However, I am of the view that the available judicial examples on this matter have elaborated fundamental rights-based discourses characterised by a good potential of further development – particularly with respect to accommodating both the particular needs of immigrant mothers in paid employment and those of immigrant mothers entirely devoted to unpaid care work within the household.

c. Immigrant Women and Freedom from Domestic Violence

Broadly speaking, Spanish law appears to offer a comprehensive system of protection to immigrant women victims of domestic violence. The Spanish Criminal Code⁶⁸⁰ envisages several offences in relation to domestic violence. In addition to provisions punishing various conducts in which domestic violence may be manifested– i.e., homicide, battery, sexual aggression and abuse, deprivation of liberty and so forth – the Criminal Code also establishes specific norms on domestic violence. In the latter field, numerous reforms have been approved in relation to both the Criminal Code and the Criminal Code of Procedure⁶⁸¹. The most recent changes were introduced with *Ley Orgánica 1/2004*⁶⁸², which aimed at establishing a comprehensive system of prevention and suppression of domestic violence and violence against women in general, including but not limited to a criminal law response. In addition to reforming relevant provisions of the Criminal Code, *L.O. 1/2004* indeed envisaged a heterogeneous set of measures which included the implementation of awareness-raising programmes in the educational system, in the media and in the healthcare system, the provision of information as well as social and legal assistance to victims, the granting of the possibility to modify work-related aspects in order to accommodate victims' needs, as well as

⁶⁸⁰ *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, BOE no. 281 of 24 November 1995.

⁶⁸¹ The Spanish Criminal Code of Procedure dates back to 1882 (*Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal*). Among the many reforms involving provisions on the matter of domestic violence established by the Criminal Code and the Criminal Code of Procedure, see: *Ley Orgánica 14/1999, de 9 de junio, de modificación del Código Penal de 1995, en materia de protección a las víctimas de malos tratos y de la Ley de Enjuiciamiento Criminal*, BOE no. 138 of 10 June 1999; *Ley Orgánica 27/2003, de 31 de julio, reguladora de la Orden de Protección de las víctimas de la violencia doméstica*, BOE no. 183 of 1 August 2003; *Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros*, BOE no. 234 of 30 September 2003; *Ley Orgánica 13/2003, de 24 de octubre, de reforma de la Ley de Enjuiciamiento Criminal en materia de prisión provisional*, BOE no. 257 of 27 October 2003; *Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, BOE no. 283 of 26 November 2003.

⁶⁸² *Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género*, BOE no. 313 of 29 December 2004.

the granting of economic aid to victims. Immigrant women are however specifically mentioned by the *L.O.* only in art. 32(4), whereby collaboration programmes elaborated by public authorities with the aim of preventing and persecuting gender-based violence must “grant special consideration to the situation of women who, due to their personal and social circumstances, may run a higher risk of suffering from gender-based violence or may experience stronger difficulties in accessing the services envisaged by this Law, like women members of minorities, immigrant women, women experiencing social exclusion or disabled women”.

As to the specific provisions of the Criminal Code related to domestic violence, art. 153(1) and 173(2) constitute the two most important references. Under Title III of the Code (which regulates criminal offences causing injury), art. 153(1) punishes those who “by any means or process cause psychological or physical harm that are not defined as a criminal offence by this Code to others, or batter or abuse others without causing them injury, when the victim is the spouse, or a woman that is or has been in an analogous relationship with them also without cohabitation, or a particularly vulnerable person that lives with the perpetrator” with detention from six months to one year or by socially useful work from thirty to eighty days, as well as with the prohibition to detain or carry weapons from one to three years and eventually with the deprivation of parental rights.

On its part, art. 173(2)– under the heading “torture and other offences against moral integrity” – punishes “those habitually putting in place physical or psychological violence” against current or former spouses, or against persons who are or have been in “an analogous relationship also without cohabitation” – among other victims – with detention from six months to three years, as well as with the prohibition to detain or carry weapons from two to five years and eventually with the deprivation of parental rights, in addition to the punishments envisaged by specific provisions prohibiting the concrete acts constituting physical or psychological violence. Victims of domestic violence may obtain three main precautionary measures: the preventive detention of the alleged perpetrator pursuant art. 502 ff. of the Criminal Code of Procedure, restraining orders *ex* art.48 of the Criminal Code and art.544-*bis* of the Criminal Code of Procedure, and the protection order pursuant art.544-*ter* of the Criminal Code of Procedure.

The protections envisaged by Spanish immigration law, similarly to the case of Italy, relate both to the possibility of acquiring independent permits for reunited family members and a

general residence permit to be granted to victims of gender-based violence. As to the first aspect, art. 59(2)(b) of *R.D. 557/2011* establishes that the reunited spouse or partner will be able to obtain an independent residence and work permit whenever he or she “is a victim of gender-based violence, once a judicial protection order has been issued in his or her favour or, alternatively, in presence of a report by the Public Prosecutor indicating the existence of signs of gender-based violence”. Moreover, this permit will also be accessible to “victims of a criminal offence for violent behaviour in the family environment”, always in presence of the mentioned protection order or Public Prosecutor’s report. Importantly, art. 59(3) also ensures that victims of gender-based violence will not be discouraged from reporting their situation for fear of jeopardising their children’s (or other family members’) residence status, or of having to renounce to enjoy family life with them. This provision indeed allows family members who have also benefited from family reunification to “maintain the residence permit issued to them” and provides that “they will depend, for the purpose of renewing residence permits on the grounds of family reunification, on the family member with whom they cohabit”.

Another extremely positive provision for enforcing immigrant women’s freedom from domestic violence consists in art. 59(1) of the *R.D.* By regulating several possibilities of obtaining an independent residence permit for reunited family members beyond “emergency” situations such as widowhood, separation or divorce, or domestic violence. This provision in my view strongly supports an equal relationship between sponsors and reunited family members, which is also beneficial in terms of the prevention of domestic violence. Despite its narrow focus on purely economic requirements, this norm is worth mentioning. In particular, art. 59(1) allows family members to obtain independent permits whenever they are able to show sufficient economic means for the granting of a residence permit for non-lucrative purposes, or an employment contract with a minimum duration of one year, or when they are able to comply with requirements established for the granting of residence and self-employment permits.

Immigrant women victims of domestic violence also enjoy a specific protection granted by art. 31-*bis* of *L.O. 4/2000*. This provision regulates the possibility for women experiencing gender-based violence to obtain a residence permit for exceptional circumstances regardless of their residence status. In case an immigrant woman irregularly residing on the Spanish territory reports a situation of violence, art. 31-*bis*(2) establishes that no procedure for her expulsion should be commenced, and that any pending procedures in this sense should be

suspended and that eventual expulsion orders shall not be enforced. A provisional residence permit will be granted on the condition that a protection order has been issued in favour of the alleged victims, or in presence of a report by the Public Prosecutor indicating the existence of signs of gender-based violence. According to art. 130 of *R.D. 557/2011*, the residence permit for exceptional circumstances is valid for one year and can be renewed if the competent authorities assess that the reasons justifying its granting are still present. Pursuant art. 133(2), this permit allows the holder to perform any kind of work (employed or self-employed) in any sector and without geographical restrictions within Spain.

Similarly to its art.59(2), art. 132(2) of the *R.D.* also responds to the need to ensure that immigrant women's family life with their children would not be undermined by their efforts to remove themselves from situations of violence and abuse. Art. 59(2) indeed states that "at the moment of [her] application [for a provisional residence and work permit for exceptional circumstances] or at any subsequent moment during the criminal proceedings, the foreign woman, by herself or through a representative, may apply for a residence permit for exceptional circumstances in favour of her minor children, or for a residence and work permit for exceptional circumstances in case of adult children who are on the Spanish territory at the time of the report to the authorities".

It is important to note that residence permits for exceptional circumstances are granted to victims of gender-based violence pending criminal proceedings for the crimes that they have suffered and are issued with the aim of protecting the holders from abusive situations. Once these proceedings come to an end, their result will however influence the validity of said permits. Art. 134 indeed provides that if criminal proceedings end with a sentence against the perpetrator, or with a judicial decision from which it is possible to infer that the involved woman has been a victim of gender-based violence, a definitive residence and work permit will be issued in case the victim had applied for it (otherwise she will be informed of this possibility) and eventual proceedings against the victim will be archived. In the opposite case, whereas the criminal proceedings against the alleged perpetrator of gender-based violence would conclude with a non-condemnatory judgment or with a decision from which it is not possible to infer that the involved woman has been a victim of domestic violence, art. 134(2) provides that her eventual application for a residence and work permit will be rejected, provisional residence and work permits eventually issued to her will no longer be valid and all proceedings against her initially blocked or suspended will be initiated or continued.

Ex art. 40(1)(j) of the *R.D.*, the consideration of the national labour market's situation for the purpose of issuing work and residence permits will not be carried out when an

employment contract is pursued by women holding residence permits for being victims of gender-based violence. The possibility for victims of domestic or gender-based violence to convert their permits for exceptional circumstances into more stable work and residence permits – and thus the possibility to transition from a situation of victimisation and isolation to one of integration and empowerment – is also ensured by art. 202 of *R.D. 557/2011*. This provision exempts holders of residence permits for gender-based violence who have been residing on the Spanish territory for at least one year to obtain a visa in order to access residence and work permits, or mere residence permits. Provided that the requisites established by art. 71 on the renewal of work and residence permits are satisfied, and that holders of said permits are authorised to work, they will be issued with residence and work permits. The same provisions will also apply, pursuant art. 202(4), to access to residence and autonomous work permits, to residence permits without authorisation to work, to residence and work permit for research reasons and to residence and work permits for highly-qualified workers – provided that holders of permits for exceptional circumstances satisfy the respective legal requirements.

I. Spanish Rules on Immigrant Women's Freedom from Domestic Violence: A Gendered Analysis in a Comparative Perspective

Against the described normative background, it appears clearly that Spanish rules applicable to immigrant women victims of domestic violence form a comprehensive system of protection that presents several differences with respect to the Italian provisions on this matter. In relation to immigrant women holding residence permits for family reunification, Spanish law appears to constitute a more favourable legislation in comparison to the Italian context. The Italian legal system, indeed, does not offer equally clear opportunities to react to situations of domestic violence for women holding residence permits for the purpose of family reunification. If art. 12(3) of legislative decree n. 30/2007 at least envisages limited possibilities for family members of Italian or Union citizens in this sense⁶⁸³, an utter lack of

⁶⁸³ As discussed in the chapter 3, this provision envisages the possibility for family members of Italian or Union citizens residing in Italy by virtue of a residence permit for family reunification to maintain their residence rights in case they are victims of criminal offences pertaining to the family realm (including domestic violence), but only in the context of divorce or marriage annulment. Moreover, art. 12(4) specifies that the maintenance of residence rights will in any case be subordinated to the requisite of carrying out an employed or self-employed activity or to have sufficient resources for themselves and their family members so that they do not become a burden for the national social assistance system, or to be part of the family unit of a person who satisfies these conditions.

clarity characterises the situation of victims of violence holding residence permits by virtue of being family members of third-country nationals. On a more general level, the broader possibilities to access independent permits for family members holding permits for family reunification – with the observed positive effects especially on sex equality within migrant couples – beyond “emergency” situations as envisaged by Spanish law have no correspondence in the Italian order. The latter, indeed, exclusively grants third-country national spouses with an explicit possibility to convert residence permits for family reunification into other types of permit in case of widowhood, separation and divorce.

Moving on to specific residence permits for victims of domestic violence, the permit for humanitarian reasons recently extended to this group by art. 18-*bis* of the *T.U.* appears to be different from the corresponding Spanish residence permit for exceptional circumstances in several ways. On the one hand, I would argue that Spanish law offers a more effective protection whereby – in addition to the fact that under Spanish law criminal proceedings for gender-based violence may also be initiated by other individuals and not necessarily by the victim - it does not require an active role on the victim’s part beyond that of requesting a provisional residence and work permit during criminal proceedings against the alleged perpetrator. The Italian residence permit, instead, will be issued only where the present and actual danger for the physical integrity of the immigrant women involved constitutes “a consequence of the choice to subtract themselves from (...) violence or as an effect of their declarations in the context of preliminary investigations or criminal proceedings”. From this point of view, the Spanish solution appears as a more appropriate choice in that it does not require often traumatised and isolated individuals such as immigrant women experiencing domestic violence to comply with an abstract model of “deserving victim” – offering protection regardless of their active or passive attitude *vis-à-vis* situations of violence and abuse. Another positive feature of the Spanish legislation that emerges in the comparison with the Italian regime concerns the possibility to grant provisional residence permits when the situation of violence is only suspected, and has yet to be ascertained in a judicial context.

On the other hand, the Italian regime appears to be more comprehensive in the sense of allowing access to residence permits not only in the context of proceedings initiated to prosecute perpetrators, but in a variety of realms which – pursuant art. 18-*bis*(3) of the *T.U.* – also include interventions by anti-violence centres, local social services or social services specialised in assisting victims of domestic violence. Even if in these cases the opinion of the competent judicial authorities is still a necessary prerequisite, it appears extremely positive

that the granting of a residence permit for humanitarian reasons is not subordinated to the initiation of criminal proceedings (which may not be the preferred solution for immigrant victims due to psychological, economic or social and cultural reasons). The involvement of social services also constitutes an important feature, especially because their grassroots work among immigrant communities and society in general allows them to effectively detect and respond to situations of violence or abuse.

The different contexts on which the two national regimes focus (the judicial context for Spanish law and the broader social realm for Italian law) also bear consequences on the respective regulation of withdrawal of residence permits granted to victims. In the Spanish case, the provisional permit will be revoked only when criminal proceedings conclude with the acquittal of the alleged perpetrator or establish that the alleged violence has not taken place – whereas art. 18-*bis* of the Italian *T.U.* establishes that permits will be revoked in case of “conduct which is incompatible with the scopes of the permit itself” or when the conditions justifying its release no longer subsist. In this light, it appears that the Spanish rules expose immigrant women to the risk of losing the provisional residence permit if they fail to prove the violence and abuse suffered. In this respect, it must be noted that language and socio-cultural barriers as well as, in some cases, the competent authorities’ stereotypical views towards them, may negatively influence immigrant women’s capability to obtain a judicial recognition of domestic violence⁶⁸⁴. The consequences of such a failure could be disastrous in that not only they would be deprived of provisional residence permits, but those irregularly residing in Spain would also risk expulsion from the national territory. Therefore, the described focus on the outcome of judicial proceedings may seriously discourage many immigrant women – especially irregular residents – from reporting their situation to the authorities and risking their residence rights. It has been argued that the risk implied in such a legislation is necessary to avoid false accusations of domestic violence being made by women looking to acquire residence permits and regularise their status⁶⁸⁵. However, I am of the view that the different solution advanced by the Italian system allows for an effective control of the genuine character of situations of abuse and violence without the drawbacks of the Spanish rules. The Italian regime’s openness to extrajudicial solutions indeed appears to be more

⁶⁸⁴ PÉREZ, M., ‘Emergency Frames: Gender violence and Immigration Status in Spain’, 18(2) *Feminist Economics* 265 (2012).

⁶⁸⁵ ALMENDROS GONZÁLEZ, M. A., ‘La mujer Extranjera Trabajadora Víctima de Violencia de Género’, in García Castaño, F. J., Kressova, N., (eds.), *Actas del I Congreso Internacional Sobre Migraciones en Andalucía*, Instituto de Migraciones, Granada, Spain, 2011, p. 314 ff.

gender-sensitive and more responsive to the specific difficulties of immigrant women, although I have highlighted how the lack of clarity as to what would constitute “incompatible behaviour” or changed conditions incompatible with the scope of the permits may be very problematic in itself.

Lastly, an important provision envisaged by Italian law concerns the possibility to revoke residence permits and expel third-country national perpetrators of criminal offences connected to domestic violence ex art. 18-bis(4-*bis*) of the *T.U.* While Spanish law does not establish a similar possibility, in the next section I will discuss judicial examples of the interaction between fundamental-rights based argumentations and the denial of residence rights to third-country national perpetrators of domestic violence.

In sum, I would argue that – despite presenting some gendered shortcomings – the Spanish system for protecting third-country national immigrant women against domestic violence is well developed and quite comprehensive. Both in the case of being undocumented and in the case of holding residence permits for family reunification, immigrant women in Spain are offered many normative safeguards of their right to live free of violence.

Fundamental rights in this field constitute an important reference for two main reasons. Firstly, as in the other aspects of family life discussed in this chapter, the State’s obligation to protect fundamental rights underlies many relevant norms on gender-based violence. *Ley Orgánica* 1/2004 itself recognised in its Preamble that “gender-based violence (...) constitutes one of the most flagrant attacks on fundamental rights such as freedom, equality, life, security and non-discrimination established in our Constitution”. Its art. 17(1) also establishes a general equality and non-discrimination clause, whereby the rights recognised by the *L.O.* must be ensured to all women regardless of their origin, religion or any other personal or social circumstance – which may implicitly understood as including nationality⁶⁸⁶ – while art. 17(2) of the *L.O.* states that information as well as social and legal assistance to victims “contribute to the realisation and effectiveness of their constitutional rights to physical and moral integrity, to freedom and security and to equality and non-discrimination on the grounds of sex”. Fundamental rights have also influenced relevant reforms concerning

⁶⁸⁶ MELLA MÉNDEZ, L., ‘El Tratamiento de la Víctima de Violencia de Género en la Normativa Española de Extranjería’, 1(1) *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo* (January-March 2013) 1, p. 3 [translation mine].

immigrant women's freedom from violence. For instance, *Ley Orgánica* 10/2011⁶⁸⁷ modified art. 31-*bis* of L.O. 1/2004 in the sense of allowing irregularly staying immigrants to report the gender-based violence suffered without having an administrative proceeding initiated against them on the grounds of their irregular stay. This reform was explicitly motivated by the need to "prioritise the protection of women's rights to physical and moral integrity, when they are subjected to gender-based violence, as well as their right to effective judicial protection, *vis-à-vis* a sanction motivated by their irregular status"⁶⁸⁸. Secondly, fundamental rights were at the heart of the Spanish courts' judicial reasoning in at least one aspect of domestic violence against immigrant women, which I will now move on to examine more closely: the denial of residence rights to perpetrators.

II. Influence of Fundamental Rights Law on the Denial of Residence Rights to Perpetrators of Domestic Violence

Before Spanish courts, a compelling interaction between competing fundamental rights is observable in relation to the pursuance of residence rights by perpetrators of domestic violence. In the examples that will be analysed in this section, perpetrators of domestic violence relied on fundamental rights established by the Spanish Constitution or by international human rights law to argue in favour of their right to reside on the Spanish territory.

A first important case in this respect was assessed by the *Audiencia Provincial* of Madrid in 2010⁶⁸⁹. Here, a foreign husband had been condemned by the *Juzgado Penal* of Madrid for repeatedly subjecting his wife to violence and attacking her physical integrity, and thus for breaching art. 153(1) of the Spanish Criminal Code. In addition to issuing a restraining order against him and depriving him of the faculty to own and carry weapons, the *Juzgado* had sentenced the husband to one year of detention and had established that this punishment would be substituted by his expulsion from Spain and the prohibition to return for ten years. At the time of this first judgment, art. 89(1) of the Spanish Criminal Code provided that all criminal penalties consisting in detention under six years against irregularly staying foreigners

⁶⁸⁷ *Ley Orgánica* 10/2011, de 27 de julio, de modificación de los artículos 31 bis y 59 bis de la *Ley Orgánica* 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 180 of 28 July 2011.

⁶⁸⁸ *Ibid.*, Preamble.

⁶⁸⁹ *Audiencia Provincial de Madrid (Sección 27º)*, sentencia no. 395 of 4 March 2010.

would be substituted with expulsion from the Spanish territory, unless the competent judge or court exceptionally assessed that the “nature of the offence” justified the serving of a term of imprisonment in Spanish detention facilities. The reference to the nature of the offence had in the meantime been eliminated by *L.O. 11/2003* on measures concerning domestic violence⁶⁹⁰. With the aim to provide criminal court judges with an adequate basis to substitute detention with expulsion and to “avoid that the sentence and its serving become a way to remain in Spain, thus radically undermining the sense of the entire legal order”⁶⁹¹, the reform modified art. 89 in the sense that expulsion as a general rule could be changed into detention in Spain only when courts and judges “detect reasons” justifying this exception.

Before the *Audiencia Provincial*, the convicted husband appealed against the judgment of the lower criminal court maintaining that the legal conditions for condemning him to expulsion rather than detention were lacking, and that he had not breached art. 153(1) of the Criminal Code because his actions were not “a manifestation of discrimination and dominance of a husband towards his wife”⁶⁹². The *Audiencia* responded to both argumentations on the grounds of fundamental rights. In fact, it was precisely on the grounds of fundamental and human rights that this court upheld in part the husband’s appeal.

In this judgment, indeed, the *Audiencia* assessed that the reference to the nature of the crime by the old version of art. 89 of the Criminal Code had to be interpreted in the sense of requiring judicial authorities to consider “some other element that allows to evaluate whether to grant expulsion or, exceptionally, to proceed to serving the sentence in Spain”. Moreover, the court clarified that “these elements must necessarily be the circumstances of the fact and of the perpetrator”. In order to ground these considerations, the *Audiencia* recalled a previous judgment by the *Tribunal Supremo* where the expulsion of a third-country national man convicted for selling heroine, instead of his detention, had been assessed as contrary to the law also because it infringed his right to family life⁶⁹³. In particular, the *Tribunal Supremo* had observed that “the norms currently in force must be interpreted on the grounds of a

⁶⁹⁰ *Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social*, cit.

⁶⁹¹ *Id.*

⁶⁹² *Audiencia Provincial de Madrid (Sección 27ª)*, sentencia no. 395/2010, cit., § 3 of Legal Grounds.

⁶⁹³ *Tribunal Supremo (Sala 2ª, de lo Penal)*, sentencia no. 901 of 8 July 2004. In particular, the *Tribunal Supremo* observed that “the norms currently in force must be interpreted on the grounds of a constitutional reading *vis-à-vis* the reality of the effects which said norms can produce on the fundamental rights of all persons – whether they are immigrants or not, illegal or not – recognized not only by the (...) Constitution but also by international treaties signed by Spain, and which pursuant art. 10 not only constitute applicable domestic law, but must also be interpreted in conformity with said Treaties and the ECHR’s case-law” (*ibid.*, § 2 of Legal Grounds). Thus, the Tribunal annulled the appealed judgment because the appellant had resided in Spain for the previous 17 years, and had had a family for the previous two years, which also included two children born in Spain.

constitutional reading *vis-à-vis* the reality of the effects which said norms can produce on the fundamental rights of all persons – whether they are immigrants or not, illegal or not – recognised not only by the (...) Constitution but also by international treaties signed by Spain” and that pursuant art. 10 of the Constitution, fundamental rights “not only constitute applicable domestic law, but must also be interpreted in conformity with said Treaties and the ECHR’s case law”⁶⁹⁴.

Against this background, the *Audiencia* established that the fundamental right to family life of the convicted husband should have supported an exceptional sentence to detention rather than expulsion, because several of his family members resided in Spain – including his Spanish citizen mother as well as their regularly resident father and brother – and because he had been registered as a resident in the same city for more than nine years⁶⁹⁵.

As to the husband’s objection that he had no discriminatory intent when committing violence against his wife, the *Audiencia* clarified that “according to wide legal experience and to international treaties signed by our country, gender-based violence constitutes the most cruel manifestation of a conception of women as subordinated to men, and as bound to obedience and submission within relationships”⁶⁹⁶. The refusal to include a supposed intention to discriminate within the constitutive elements of the crime of gender-based violence is perfectly in line with international human rights law and jurisprudence. From the CEDAW to the Istanbul Convention, and including the Inter-American Convention of Belém do Pará, the construction of gender-based violence as sex discrimination has been

⁶⁹⁴ *Ibid.*, § 2 of Legal Grounds. In this case, the Tribunal annulled the appealed judgment also because the appellant had resided in Spain for the previous 17 years, and had had a family for the previous two years which also included two children born in Spain.

⁶⁹⁵ Another interesting case where the perpetrator’s right to remain in Spain was recognised concerned a Brazilian national couple residing in Spain who had committed mutual violence against each other and had been recognised as criminally responsible of family mistreatment *ex art. 153(2) of the Criminal Code (Audiencia Provincial de Madrid (Sección 27ª), sentencia no. 689 of 2 July 2011)*. The female partner had turned to the *Audiencia Provincial* of Madrid to oppose the authorities’ decision to expel her from Spain rather than condemning her to detention. The peculiar situation of the female applicant as both perpetrator and victim of violence towards a partner meant that the *Audiencia* had to assess her case on the grounds not only of her fundamental right to family life – which could be breached by the decision to deport her as a penalty for her crime – but also of her fundamental right to physical and moral integrity as a victim of gender-based violence. In particular, after assessing that the applicant did not enjoy any kind of family life nor rootedness in Spain, the Court observed that “by authorising expulsion preventing [the applicant] from exercising the rights that the legal order grants her [i.e., to apply for a residence permits for exceptional circumstances], the protection of the rights to physical and moral integrity of women victims of gender-based violence would be made illusory and diminished” *Ibid.*, § 4 of Legal Grounds. Therefore, the *Audiencia* quashed the authorities’ decision to expel the applicant while the proceedings for the violence she had suffered were still ongoing.

⁶⁹⁶ *Audiencia Provincial de Madrid (Sección 27ª), sentencia no. 395/2010, cit.*, § 3 of Legal Grounds.

consolidated regardless of the discriminatory intent of the entity breaching said right (private individuals or the state)⁶⁹⁷.

Despite the latter clarification, it appears clearly that in the discussed case the fundamental and human right to family life of the perpetrator allowed him to obtain a more favourable result, consisting in being allowed to pursue residence rights once completing his sentence instead of being prevented from entering the country in which he had committed domestic violence for ten years. One may argue that grounding a more favourable interpretation of criminal law provisions on the basis of the fundamental right to family life of individuals convicted for intra-marital violence is a questionable endeavour, raising the question of whether expulsion orders may actually be considered as a disproportionate measure when the crime committed has precisely caused a disruption of the family realm. Assurances that fundamental-rights based argumentations by perpetrators would not be carried too far, however, have come from a subsequent judgment on domestic violence where the fundamental rights of victims were taken into stronger consideration.

In 2012, the *Tribunal Superior de Justicia* of Castilla y León was submitted with the case of a husband convicted for domestic violence who pursued residence rights in Spain on the grounds of his fundamental right to enjoy family life with the victim herself⁶⁹⁸. More specifically, the applicant was a man from Morocco whose application for a residence permit for family members of Union citizens had been rejected due to his criminal record – which,

⁶⁹⁷ In relation to this matter, important clarifications have been provided by the CEDAW Committee in General Recommendation no. 19 (cit.), whereby gender-based violence is included in the definition of discrimination and defined as violence “directed against a women because she is a woman or that affects women disproportionately” (*ibid.*, §6). As is noticeable, the reference to disparate impact suggests that the Committee’s focus is not on perpetrators’ intent, but rather on the effects of the violence committed. Even more significantly, in its judgment of *Opuz v. Turkey* (cit.), the European Court of Human Rights established that “the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional” (*ibid.*, § 191). The *Opuz* judgment also constituted an important reference in the case of *González et al. (“Cotton Field”) v. Mexico* of 13 November 2009 by the Inter-American Court of Human Rights (see in particular § 390 – 402).

The principle whereby discriminatory intent on the perpetrators’ part is not a constitutive element of the offence of violence against women is particularly important, not only to ensure an effective protection to victims (including immigrant women). The emergence of this principle in international human rights law and jurisprudence also provides an answer to the doubts raised by some feminist scholars about the opportunity of framing violence against women as a form of sex discrimination. I would argue, indeed, that their perplexities are in part motivated by their understanding of this framing as inextricably linked with a supposed need to ascertain perpetrators’ intent to discriminate on the grounds of sex (for this critique, see GOLDSCHIED, J., ‘Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches’, 28 *Thomas Jefferson Law Review*, (2005) 355, p. 358 ff., and EDWARDS, A., *Violence Against Women Under International Human Rights Law*, Cambridge University Press, Cambridge, 2011, p. 192 ff.)

⁶⁹⁸ *Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 1ª)*, sentencia no. 1273 of 29 June 2012.

among other offences, included domestic and gender-based violence against his wife. The applicant opposed this decision, invoking “the principle of protection of the family pursuant art. 39 of the Constitution and the European Court of Human Rights”.

In this case, the Tribunal decisively rejected the husband’s argumentation. It observed that the rejection of his application for a residence permit had to be upheld not only because it responded to public order and security reasons, but also due to the specific circumstances of the case. Indeed, “the applicant’s conduct [constituted] a real, present and sufficiently serious menace that affects a fundamental interest of society”⁶⁹⁹. With specific reference to the perpetrator’s constitutional right to family life, the Tribunal held that the rejection did not constitute a breach of the principle enshrined in this provision. The reason for this conclusion highlighted the sheer contradiction implied in the invocation of the constitutional principle of protection of the family by an individual who had himself harmed his family. In particular, the Tribunal rightly observed that “the nature of the committed offence of gender-based violence, which especially disgusts society, prevents the applicant’s claim from finding any legal ground in the recalled protection of the family, whose minimum rights, freedom, physical integrity, security, the dignity of his spouse, mother of the two minor children whose protection he invokes, he has failed to acknowledge in such a relevant way that it has brought to a criminal conviction for the offence of domestic violence”⁷⁰⁰. In further support of this point, the Tribunal recalled the Preamble of L.O. 1/2004 and its definition of gender-based violence as a breach of the fundamental rights to freedom, equality, life, security and non-discrimination established by the Constitution.

The judgments examined in this paragraph constitute a good example of how fundamental and human rights-based argumentations may be advanced not only by victims but also by perpetrators of domestic violence. When the latter incorporate fundamental rights in their legal strategies to pursue residence rights and oppose expulsion orders issued against them, the complexity and often the contradictions underlying situations of domestic abuse emerge. The fact that the fundamental right invoked by perpetrators concerns the constitutional principle of protection of the family highlights this contradiction even further, because these individuals pursue the enjoyment of a family life which they themselves disturbed with their violent behaviour. In the case of judgment no. 1273/2012 by the *Tribunal Superior de Justicia* of Castilla y León, this contradiction was particularly evident, leading to a significant

⁶⁹⁹ *Ibid.*, § 4.

⁷⁰⁰ *Id.*

reasoning on the conflict between the need to protect the victim's fundamental right to physical and moral integrity and the perpetrators' claims of violation of his fundamental right to family protection. Interestingly, this conflict was solved not merely by stating the prevalence of the former over the latter, but by highlighting that committing domestic violence against one's wife and the mother of one's children harms the whole family rather than "just" her physical and moral integrity and dignity, thus making the invocation of the constitutional principle of family protection in one's favour a hollow argument.

d. Overall Influence of Spanish Fundamental Rights Law on Immigrant Women's Enjoyment of Family Life

In the field of family life, the discussed provisions of Spanish law and the related case law suggest the presence of a manifold influence of fundamental rights on immigrant women's family life in Spain. Interestingly, in the analysed judicial examples, fundamental rights-based analyses of Spanish norms produced both positive and negative outcomes in relation to the same aspect, i.e., the one breadwinner model. On the one hand, some of the discussed judicial examples suggest that the constitutional principle of protection of the family and of the fundamental right to family life can *de facto* translate into the imposition of a rigid distinction between productive and reproductive work within the family – with immigrant women disproportionately assigned to the latter – and of a one breadwinner model. This was the case, for instance, of the examined case law concerning access to residence rights for parents of Spanish children, but was also confirmed by a judicial example regarding income requirements imposed by family reunification rules (judgment no. 1258/2012 by the *TSJ* of Castilla y León⁷⁰¹). On the other hand, always in relation to income requirements, I discussed a meaningful example of disestablishment of the one breadwinner model on the very same constitutional grounds. This result was achieved by virtue of an alternative judicial construction of the family (as a whole rather than as the sum of individually-considered persons) which was much more sensitive to the different types of contributions to its wellbeing, including unpaid care work in addition to purely financial shares.

This discrepancy offers further confirmation of the absolute importance of a gender-sensitive interpretation of fundamental rights in order for the latter source to correct biased legal norms and their disparate impact on immigrant women. The judgments examined in the

⁷⁰¹ *Tribunal Superior de Justicia de Castilla y León, sentencia no. 1258 of 22 June 2012, cit.*

context of domestic violence, on their part, suggest that such an interpretation is also crucial to realise a balance between competing fundamental rights that does not disproportionately and negatively affect immigrant women's right to physical and psychological integrity.

4. Immigrant Women's Fundamental Rights in the Field of Employment: Problematic Provisions of Spanish Law

In relation to immigrant women's fundamental rights in the field of employment, two main aspects of Spanish law appear particularly interesting. The first concerns problematic immigration law provisions imposing either continuous employment or an active search for employment for the renewal of residence and work permits. The second aspect deserving attention concerns the legal protections available to immigrant women against discriminatory dismissal on the grounds of sex and migrant status. In this section, I will examine both by highlighting the main issues disproportionately experienced by immigrant women in these realms – as a consequence of legal norms themselves or of their judicial application –and discussing relevant judicial decisions where fundamental rights have indeed proved to constitute a positive reference.

a. Immigrant Women's Residential Stability and Legal Requirements Based on Continuous Work or Active Search for Employment

Reconciling work and family life is disproportionately difficult for immigrant women in Spain in comparison to both their male counterparts and Spanish women. On the one hand, indeed, immigrant women are often not immune to the broader problem of unequal distribution of care and housework burdens between sexes. On the other hand, in comparison to citizen women, third-country national immigrants have fewer resources to rely on in order to alleviate such a burden. For instance, as foreigners they have restricted or no access to social assistance services. Moreover, living in a foreign country often prevents migrants from enjoying the support of family networks that would be available in the country of origin⁷⁰².

As a result of these issues, immigrant women experience disproportionate difficulties in maintaining continuous employment. Moreover, it has been noted that the unequal bearing of care burdens pushes immigrant women to pursue more flexible employed activities, including

⁷⁰² BERNARDI, F., GARRIDO, L., MIYAR, M., 'The Recent Fast Upsurge of Immigrants in Spain and Their Employment Patterns and Occupational Attainment', 49(1) *International Migration* (2011) 148, p. 167.

those in the informal sectors of the labour market, as a reconciliation strategy⁷⁰³. This, in turn, aggravates the higher precariousness already experienced by immigrant women on the national labour market due to their concentration in sectors characterised by lower labour protections and low pays. In a vicious circle, such higher precariousness combines with disproportionate care burdens in pushing immigrant women to question whether reconciliation efforts may be worth it altogether, and thus to renounce employment more or less permanently and devote themselves entirely to reproductive and care work within the family⁷⁰⁴.

In the light of these considerations, certain provisions of Spanish immigration law concerning the renewal of residence and work permits appear to be disproportionately difficult for third-country national immigrant women to comply with. In particular, art. 38(6) of *Ley Orgánica* 4/2000 and art. 71 of *Real Decreto* 557/2011 may constitute a problematic provision in this sense.

Art. 38(6) of the *L.O.* lists the cases where the renewal of residence and work permits is admitted. In particular, renewal will be possible when the employment contract on the grounds of which the permit was initially granted persists or has been renewed, or when a new employment contract has been concluded, when the competent authorities have granted the holder of the permit with unemployment benefits, when the foreigner receives an economic social assistance benefit aimed at advancing his or her integration in society or in the labour market, or when “other circumstances envisaged by regulations subsist, and in particular, the prerequisites for the termination of employment contracts or suspension of the employment relationship as a consequence of being a victim of gender-based violence”.

Art. 71 of *R.D.* 557/2011 specifies the rules established by art. 38(6) of the *L.O.* In particular, its paragraph 2 clarifies all the hypotheses in which residence and work permits may be renewed. Obviously, renewal is possible when the holder shows that the employment relationship that justified the initial concession of the permit is still in existence. If this condition is not satisfied, art. 71(2)(b) and (c) envisage two main possibilities. Firstly, in case the holder is able to prove that he or she has “habitually carried out the employed activity on the grounds of which the initial permit was granted for a minimum of six months per year”, renewal will be possible if a new employment contract “which complies with the characters of

⁷⁰³ PARELLA, S., PETROFF, A., SOLÉ, C., ‘The Upward Occupational Mobility of Immigrant Women in Spain’, 39(9) *Journal of Ethnic and Migration Studies* (2013) 1365, p. 1369.

⁷⁰⁴ Parella, S., Samper, S., ‘Factores Explicativos de los Discursos y Estrategias de Conciliación’, cit.

the work permit” has been concluded with a different employer, or if the holder has concluded a new contract that complies with the requisites established by art. 64 of the *R.D.* for the initial granting of a residence and work permit. Secondly, in case the worker has carried out an employed activity for less than three months per year, the renewal will be granted if he or she can prove three cumulative conditions: that the employment relationship on which the initial residence and work permit was grounded has come to an end “for reasons beyond his or her will”, that he or she “has actively searched for employment, by enrolling as a jobseeker in the *Servicio Público de Empleo*”⁷⁰⁵ and that at the time of application he or she has signed “a valid employment contract”.

In addition to these hypotheses, art. 71(2) of the *R.D.* establishes that renewal will be accessible to those receiving unemployment benefits or social assistance benefits pursuant art. 38(6)(b) and (c) of the *L.O.* and to victims of gender-based violence ex art. 38(6)(d) of the *L.O.* Lastly, art. 71 also allows the renewal of permits in two exceptional circumstances, i.e., when the applicant has worked for at least nine months out of twelve or for eighteen months out of twenty-four, the last employed relationship came to an end for causes beyond his or her control and he or she has actively sought employment, as well as when the applicant’s spouse or partner satisfies the economic threshold necessary for the purpose of family reunification with him or her.

A reading of the described legislation in the light of immigrant women’s difficulties in reconciling work and family life, and of the employment precariousness disproportionately experienced by this group, suggests that the insistence of Spanish immigration law on continuous work (or at least on an active search for employment) as a precondition for renewing residence and work permits undermines this category’s access to residence rights in conditions of equality and non-discrimination with men. This is in my view also suggested by judicial examples concerning immigrant women applicants who submitted their specific difficulties precisely in complying with similar requirements.

From the outset, it must be observed that in several instances fundamental rights law was completely absent from applicants’ claims and the competent courts’ analysis equally. Interestingly, such cases were also those where the applicants’ argumentations were most

⁷⁰⁵ It must be noted that while art. 71 of R.D. 557/2011 considers “active search for employment” the mere enrolment in the *Servicio Público de Empleo* as a jobseeker, the previous norms established by art. 54(4) of R.D. 2393/2004 understood this requirement to be satisfied when immigrants participated in actions determined by public services or to programmes aimed at social and labour integration carried out by public or private bodies supported through public funds.

often rejected by said courts. The *Tribunal Superior de Justicia* of the Comunidad Valenciana was one of the earliest judicial authorities to face the discussed issue. In judgment no. 823/2011⁷⁰⁶, the Tribunal was submitted with the case of a third-country national woman who opposed the authorities' decision not to grant her a renewal of her residence and work permit because she had failed to work for a sufficient number of days pursuant art. 54(3) of *R.D.* 2393/2004, neither had she actively sought employment as required by art. 54(4) of the *R.D.*⁷⁰⁷. In support of her claim that the authorities' refusal was contrary to the law, the applicant submitted that during the two years of validity of her permit she had given birth to two children, which explained the rescission in advance of her employment contracts or the denial of their extension. She also highlighted that she had in fact sought new employment and that she would have been employed as a seasonal domestic workers had she not been denied with the renewal of her permit. Regrettably, the Tribunal deemed these allegations to be irrelevant in consideration of the fact that the applicant had not substantiated her statements with proof.

Nonetheless, not one month passed before the same Tribunal was submitted with an essentially identical case. In judgment no. 874/2011⁷⁰⁸, this court assessed the case of a third-country national woman whose application for the renewal of her residence and work permits had been denied by administrative and judicial authorities because she had failed to satisfy the requirements of art. 54(3) and (4) of *R.D.* 2393/2004. Among other argumentations, the applicant stressed that the denial was disproportionate in the light of the fact that she had interrupted her employment relationship and had not actively sought employment because her child suffered from a chronic illness and she had to take care of him for six months. In response, the Tribunal simply stated that notwithstanding the applicant's allegations concerning her child's sickness, her case had been rightly assessed in first degree – where the competent judge had concluded that “her leave due to (...) her son's sickness [was] not decisive for the purpose of obtaining the requested permit”,⁷⁰⁹ dismissing her claim.

A similarly dismissive attitude of immigrant women's specific difficulties in satisfying continuous work requirements can be found in judgment no. 166/2013 by the *Tribunal*

⁷⁰⁶ *Tribunal Superior de Justicia de la Comunidad Valenciana, (Sala de lo Contencioso-Administrativo, Sección 5ª), sentencia* no. 823 of 22 November 2011.

⁷⁰⁷ The mentioned provisions of *R.D.* 2393/2004 were transposed without any substantial modification into art. 71 of the currently in force *R.D.* 557/2011.

⁷⁰⁸ *Tribunal Superior de Justicia de la Comunidad Valenciana, (Sala de lo Contencioso-Administrativo, Sección 5ª), sentencia* no. 874 of 12 December 2011.

⁷⁰⁹ *Ibid.*, § 1 of Legal Grounds.

Superior de Justicia of Las Palmas⁷¹⁰. Here, a Nigerian woman appealed against the Spanish authorities' rejection of her application for the renewal of her residence and work permit with the motivation that she had failed to comply with art. 71(2) of R.D. 557/2011. In particular, the applicant submitted that she had only worked for one day during the validity of her initial permit because she was pregnant and because her generally bad health conditions persisted even after giving birth. Therefore, she had been prevented from working for medical reasons completely beyond her will. In the applicant's view, the disregard by the competent authorities of the reasons behind her failure to work constituted a wrongful evaluation of proof. Once again, this argumentation was not upheld by the competent court. The Tribunal indeed observed that "beyond the clinical profile in relation to her pregnancy, what is certain is that in the two years of validity of the work and residence permit [the applicant] carried out any kind of employed activity, whether continuous or not, related or unrelated with the granted work permit"⁷¹¹ and rejected her claim.

In sum, in the examined judgments the applicants' claims were mostly based on a supposedly wrongful evaluation of proof because of the authorities' failure to incorporate their specific difficulties in such an assessment. These difficulties were deemed irrelevant by courts presented with a similar argumentation. However, I am of the view that the applicants' argumentations in these judicial examples – which were strictly connected to maternity and childcare issues – epitomise very well the disparate impact of continuous work or "active search" requirements. By rejecting these argumentations, the competent courts performed a gender-blind assessment that failed to take into account the disproportionate difficulties experienced by immigrant women in this field. As a result of the application of identical standards to immigrant men and women, in these judicial examples the effects of indirect discrimination of the norms at issue in relation to immigrant women's access to residence rights were further reinforced.

In the mentioned cases, however, fundamental rights were not mentioned at all, leaving the question of their transformative potential in this area open. In this respect, helpful hints as to the possible role of fundamental rights in supporting a more gender-sensitive implementation of the biased norms at issue may be paradoxically provided by two judicial examples on the

⁷¹⁰ *Tribunal Superior de Justicia de Islas Canarias, Las Palmas (Sala de lo Contencioso-Administrativo, Sección 2ª)*, sentencia no. 166 of 5 June 2013.

⁷¹¹ *Ibid.*, § 2 of Legal Grounds.

same matter originated by claims raised by immigrant fathers. In these cases, indeed, the applicants did ground their claims on the multi-level system of fundamental rights protection in force in the Spanish legal order. Furthermore, the response of the competent courts to this judicial strategy offers important cues as to the potential of fundamental-rights based discourses to unveil the disparate impact of certain norms on immigrant women specifically.

A crucial effect of the applicants' reliance on fundamental rights law, indeed, was that the focus of the competent courts visibly shifted from the strictly objective approach adopted in the previously examined cases to a more subjective perspective. As I have stressed above, all the available judicial examples of this phenomenon originated from applications brought by migrant fathers⁷¹². A first interesting example in this area is constituted by judgment no.

⁷¹² The available judgments in applications brought by immigrant mothers are not equally pertinent for the purpose of this section because they concerned mothers of Spanish children and were therefore focused on the latter's right to reside in Spain.

In judgment no. 397/2013 by the *Tribunal Superior de Justicia* of the Basque Country (*Tribunal Superior de Justicia de País Vasco, Sala de lo Contencioso-Administrativo, Sección 3ª, sentencia* no. 397 of 20 June 2013), a positive influence of fundamental rights law was certainly present. However, because the applicant had given birth to a child with Spanish citizenship, her difficulties in complying with the legal requirements of continuous work due to the precariousness of her typically female-dominated labour sector were overshadowed by the need to ensure her child's enjoyment of his own rights and freedoms as a Union citizen. More specifically, this case concerned a third-country national woman denied the renewal of her residence and work permit for failure to comply with art. 71(2) of *R.D.* 557/2011, and in particular because she had been employed for less than three months. The applicant's situation and her specific difficulties to comply with this legal requirement are quite emblematic of the situation of many immigrant women in Spain and in Southern Europe in general: she had been employed as a domestic worker until the elderly person in her care passed away. At that point, the family for which she was working terminated her contract. The applicant had then actively sought employment not only by enrolling in a public employment bureau but also by turning to local entities that could help her find another job through more informal channels (churches, help centres, etc.). She also took some courses that could help her to acquire a broader set of skills, thus widening her employment possibilities. Moreover, the applicant also submitted that she cohabited with her Spanish partner with whom she had a child and who received social assistance benefits.

Against this background, the Tribunal based its judicial reasoning on two main aspects, both related to fundamental rights. First, the court observed that the fundamental rights and freedoms of Union citizens – as interpreted by the European Court of Justice in landmark cases such as *Zhu and Chen* and *Baumbast* – demanded that the applicant, as the mother of a Union citizen child in charge of his care, should have been authorised to work and reside on the Spanish territory in order to allow her child to exercise said rights and freedoms. Second, the fundamental rights to family life enshrined in art. 18 and 19 of the Spanish Constitution also prevented “the denial of the renewal of the applicant's permit, because the protection of the child's rights to residence and to family life established in articles 18 and 19 of the Constitution (...) would be frustrated in this case if the mother from which the child depends would be deprived of her work and residence permit” (*Ibid.*, § 4 of Legal Grounds).

In another example, the *Tribunal Superior de Justicia* of Madrid exemplified the gendered shortcomings of fundamental-rights approaches recognising immigrant women's residence rights strictly on the basis of their role as carers of Union citizen children, which I have discussed elsewhere in this thesis (for instance in the section of this chapter devoted to family life, or in my analysis of the gendered shortcomings of European family migration law carried out in Chapter 2). In its judgment no. 826/2010 (*Tribunal Superior de Justicia de Madrid, Sala de lo Contencioso-Administrativo, Sección 9ª, sentencia* no. 826 of 13 July 2010), indeed, it is possible to observe a compelling effort by a Senegalese worker and mother of a Spanish child to advance an argumentation against the authorities' refusal to renew her work and residence permit which was based on her own fundamental rights as much as on those of her child – and not strictly on the latter.

388/2012 by the *Tribunal Superior de Justicia* of Burgos⁷¹³. The applicant in this case was a father of three who claimed that he had been “forced to renounce to his job (...) in order to take care of the children, since the employment circumstances of his spouse made it more difficult for her to renounce to her job”⁷¹⁴. He opposed the authorities’ rejection of his application for a renewal of his residence and work permit under art. 54(4) of *R.D.* 2393/2004, arguing that he had in fact stopped working for reasons beyond his will as required by this provision. The Public Prosecutor, on the other hand, argued that the applicant had stopped working “without any reason”⁷¹⁵.

The applicant’s argumentation in this case constitutes one of the first traceable attempts to recall fundamental and human rights law by an unemployed migrant parent pursuing the renewal of a residence and work permit. Differently from the previously examined judgments on the same matter, in this case the applicant referred to the “need to take into consideration what can be extracted from various provisions with reference to the right to family life, a right that is overlooked when denying the permit”. More specifically, he recalled “articles 18 and 39 of the Constitution (...), articles 5 and 18 on the Convention on the Rights of the Child (...),

Unfortunately, the argument chosen by the applicant in this case was destined to fail, since it contrasted with principles that had been well established by the Spanish Constitutional Court. In the case at issue, in particular, the applicant extensively relied on her fundamental right to equality ex art. 14 of the Spanish Constitution to argue in favour of the renewal of her permit. Instead of focusing her argumentation on her child’s right to reside in Spain as a citizen of this country, she submitted that the denial of the permit because she had failed to work for the minimum period established by the law implied “a discrimination on the sole grounds of being a foreigner, and put her in an unjustifiable position of inequality with respect to Spanish women with Spanish minor children, because the denial of the possibility to work meant that she was prevented from attending her Spanish child’s care and upbringing needs in conditions of equality with Spanish mothers of Spanish children” (*Ibid.*, § 2 of Legal Grounds).

What is more, the applicant also submitted that as the mother of a Spanish minor, she was obliged under art. 39 of the Constitution to provide him with care and support and that “by denying her with a work permit, she [was] being discriminated with respect to Spanish mothers of Spanish citizens because the latter can exercise their rights to care for and raise their children [and] because they are allowed to work, while [the applicant was] prevented from providing to her Spanish child’s needs by being denied with a work permit and being kept in an irregular status” (*Ibid.*, § 3 of Legal Grounds).

In the light of the clarifications offered by the Constitutional Court with judgment no. 107/1984 (*Tribunal Constitucional Sala Segunda, sentencia* no. 107/1984, cit.), the Tribunal conceded that the applicant could not be excluded from the constitutional principle of equality only because she was a foreigner. However, the Tribunal also considered that the applicant invoked a constitutional right for which a differential treatment was admissible if and when established by the law, i.e., the fundamental right to work enshrined in art. 35 of the Constitution. Thus, the Court assessed that because *L.O.* 4/2000 establishes several preconditions for the exercise of the right to work by foreigners, the applicant could not invoke a discrimination when she had been treated differently due to her failure to comply with said requirements. The same logic applied to the right to family life granted by art. 39 of the Constitution. Therefore, the Tribunal dismissed the applicant’s claim.

⁷¹³ *Tribunal Superior de Justicia de Castilla y León, Burgos (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia* no. 388 of 27 July 2012.

⁷¹⁴ *Ibid.*, § 1 of Legal Grounds.

⁷¹⁵ *Ibid.*, § 2 of Legal Grounds.

[as well as] articles 8 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950”.

While such an attempt did not prompt the Court to uphold the applicant’s claims⁷¹⁶, it is possible to observe that the fundamental and human rights recalled at least encouraged it to look more closely into the personal circumstances of the involved persons. Regrettably, the resulting assessment after this closer look echoed that of the Strasbourg Court in the *Haydarie* case. In particular, unpaid care work was considered by the *Tribunal* as a decision to stay inactive, as a lesser alternative to productive work. In its judgment, the Tribunal held that “there is no doubt that other ways of caring for the children can be found, without the need to leave one’s job, considering that both parents are employed” and even interpreted the expression “for reasons beyond the worker’s will” as strictly confined to the employment realm⁷¹⁷. As a consequence, the failure of the applicant to fulfil the legal requirements for the purpose of obtaining the renewal of his residence and work permit was framed by the Court as a consequence of his own choices.

At this point, two main observations can be made. On the one hand, judgment no. 388/2012 suggests that resting one’s application on fundamental and human rights law has the potential to attract courts’ attention to one’s personal circumstances. Arguably, this is an extremely positive effect from our point of view, considering that one of the main sources of gender bias within national immigration law is precisely the lack of consideration of the specific circumstances and difficulties experienced by immigrant women in the host country. On the other hand, it must be noted that bringing courts to consider the personal situation of the applicant does not guarantee at all that such a consideration will occur in a gender-sensitive way. Although judgment no. 388/2012 concerned an applicant father, it appears clearly that the Tribunal’s assessment set a judicial precedent that disproportionately and negatively affects immigrant women. I have indeed repeatedly stressed that care burdens disproportionately weigh on this category.

Another telling judicial example of fundamental rights-based argumentations is provided by the subsequent judgment no. 2567/2012 by the *Tribunal Superior de Justicia* of Granada⁷¹⁸.

⁷¹⁶ In the end, the applicant was denied the renewal of his residence permit because he failed to comply with the other prerequisites imposed by art. 54 –including those concerning minimum periods of work.

⁷¹⁷ *Ibid.*, § 3 of Legal Grounds.

⁷¹⁸ *Tribunal Superior de Justicia de Andalucía, Granada (Sala de lo Contencioso-Administrativo, Sección 4ª)*, *sentencia* no. 2567 of 1 October 2012. The case was initiated by a third-country national father who was prevented from renewing his work and residence permit for failing to comply with the minimum periods of activity at the time requested by art. 54(3) and (4) of *R.D.* 2393/2004

In this case, the human rights recalled by the applicant encouraged a judicial assessment that not only took into account his personal difficulties, but also resulted in a positive outcome for him. Nonetheless, the logic of the Court was still very much grounded on the primacy of paid employment over unpaid care work. A closer analysis of the case will clarify this point.

Before the Tribunal, the applicant argued that the applicable law had been wrongfully interpreted by the competent authorities. In support of this view, he submitted that art. 54(4) had to be interpreted in a flexible way, i.e., “beyond the literal interpretation of the law, and in consideration of subjective circumstances such as the applicant’s sustenance possibilities and the fact that four minors are in his care, and that the latter have a right to his guardianship and to family protection pursuant articles 9, 10-1, 18 and 27 of the Convention on the Rights of the Child, ratified by Spain through the ratification order [*instrumento de ratificación*] of 30 November 1990 (BOE of 31 December 1990)”⁷¹⁹.

This time, the reaction of the competent court to the applicant’s invocation of human rights law was utterly positive. The *Tribunal* assessed on the one hand that the administrative and judicial authorities had denied the renewal by simply stating that the applicant had not showed that he had worked for at least three months, basing this evaluation on uncertain facts. On the other hand, and most importantly, the *Tribunal* held that “the applicant could not have possibly stayed inactive because he was in charge of caring for his four children, and in case he lacked employment, he must have actively sought it”⁷²⁰. In the *Tribunal*’s view, a similar evaluation should have necessarily been carried out by the competent authorities in the light of the “international treaties on the protection of minors and family unity, as invoked in the appeal”⁷²¹. Ultimately, the Tribunal took up what had been already affirmed by the *Tribunal Superior de Justicia of Castilla y León* in relation to the need to consider personal circumstances when assessing applications for the renewal of residence and work permits, and made a step further in consolidating this principle. It thus concluded that “the residence and dependent work permit, especially when renewal is at issue, must be granted in consideration not merely of objective circumstances such as the employed activity and its duration, but also of the subjective conditions of the worker, such as in this case his family or social rootedness, avoiding that this concession can be converted in a request of full occupation ahead of the current labour market situation of our country”⁷²².

⁷¹⁹ *Ibid.*, § 3 of Legal Grounds.

⁷²⁰ *Ibid.*, § 4 of Legal Grounds.

⁷²¹ *Id.*

⁷²² *Id.*

Against this background, it appears clearly that what was valued by the Court in this case was not the applicant's eventual care responsibilities, or his difficulties in balancing work and family life. Rather, the Court focused on the presence of four dependent children to infer that the applicant could not possibly have remained "inactive", in the sense of not performing or pursuing paid employment. Once again, the consideration of paid employment as the epitome of activity (and the implicit consideration of care work as a choice to stay inactive) was reinforced by judicial authorities. In connection to this, the applicant father's obligations towards his children were framed as purely financial: having dependent children ("*menores a su cargo*") only meant that he had to provide for them economically. In the judgment at issue, no mention was made of a mother, or of any other relative, despite the fact that the Court referred to "other people" cohabiting with the father and the children.

In the last two judicial examples, the applicants opposing the authorities' denial of a renewal of their residence and work permit were migrant fathers. In judgment no. 388/2012, the traditional gender roles in relation to the distribution of productive and reproductive work between men and women were actually reversed. Nonetheless, these judgments are still relevant from the specific point of view of immigrant women. One of the aspects at stake, indeed, was the judicial recognition of specific difficulties experienced by any person bearing the majority of care burdens within his or her family. The competent courts failed to grant such a recognition. Instead, they reproduced the well-known trope qualifying paid employment as an activity, and unpaid care work as, consciously chosen, inactivity. The fact that such an assessment was carried out on the grounds of human and fundamental rights, and despite the closer attention to the applicants' personal circumstances prompted by their invocation, is significant. It suggests that human and fundamental rights law do not offer guarantees of a gender-sensitive interpretation of immigration law, and that these sources themselves may be understood in a gender-insensitive manner. In fact, in the mentioned judgments the rights and duties of parents to provide for their children's care and upbringing as recognised both by the Spanish Constitution and by international human rights law were in my view interpreted in a strongly gendered way. In both cases, indeed, I would argue that the competent courts framed such rights and duties of the applicant fathers in a purely economic and financial manner. It is not possible to conclude with certainty that a similar interpretation would not have been carried out had the applicants been immigrant mothers. What is however certain in my view is that constructing these care obligations as encompassing both paid and unpaid activities would have prompted two positive effects. Firstly, it would have supported a

less strict (and arguably more gender-sensitive) interpretation of the Spanish rules on residence and work permits, whereby unpaid care work would have been considered as an objective burden for immigrant workers and thus as a “reason beyond their will” for the end of an employment relationship⁷²³. Secondly, because applicant fathers were involved in these cases, this judicial interpretation would have also encouraged a more equitable distribution of productive and reproductive work within migrant households by recognising unpaid care work performed by fathers as a legitimate reason for their temporary lack of employment.

In sum, the applicants’ calls for fundamental and human rights law were not a sure gateway to access residence and work permits, nor did they prompt a correction of the gendered shortcomings observed in Spanish rules on the renewal of residence permits. Nonetheless, a comparison between the group of judgments where fundamental rights were not recalled by the applicants and those where they were unveils some interesting features. Argumentations based on fundamental rights consistently prompted judicial analyses that were more careful to examine the specific situation of the individual applicants involved. This did not always result in the upholding of their claims, and much less in a gender-sensitive judicial interpretation of the norms at issue. However, this effect of fundamental rights is still remarkable because all gendered shortcomings observable in rules applicable to migrants ultimately stem from a lack of consideration of their specific needs and difficulties both as women and as migrants.

The analysed judicial examples, therefore, suggests that fundamental-rights based claims may be employed as an effective judicial strategy to prompt a contextual interpretation of certain biased norms, with the objective of unveiling their disparate impact on immigrant women. The importance of a contextual interpretation for women affected by multiple burdens (and in particular for women of colour) was already stressed by feminist scholars such as Mari Matsuda⁷²⁴, Martha Minow and Elizabeth Spelman⁷²⁵. Their arguments in support of the adoption of a legal and jurisprudential approach careful to consider not only the specificities of individual cases, but also the broader patterns of differentiation that connected individual applicants to a broader context of exclusion, appear particularly pertinent for our purposes. They suggest that a contextual interpretation in judicial contexts may effectively

⁷²³ Although having children may be hardly be qualified on a general level as a “reason beyond one’s will”, it may still be argued that experiencing disproportionate difficulties in balancing work and family life in comparison to both immigrant men and citizen women, due to, for instance, the absence of kin networks and accessible childcare services in the host country, can be qualified as such.

⁷²⁴ MATSUDA, M., ‘When the First Quail Calls: Multiple Consciousness as Jurisprudential Method’, 11 *Women’s Rights Law Reporter* (1989).

⁷²⁵ MINOW, M., SPELMAN, E. V., ‘In Context’, 63 *Southern California Law Review* (1990) 1597.

prompt a recognition of the indirect discrimination produced by the discussed norms on immigrant women. The examined judicial examples suggest that fundamental rights-based claims have the power to encourage similar interpretations, and that this strategy should be further pursued.

b. Discrimination Against Immigrant Women Workers and Access to Justice

Third-country national immigrant women living and working in Spain experience a variety of specific difficulties in the workplace, many of which are ascribable to inherent features of the labour market sectors in which they concentrate. In this section I will focus on the labour protections which immigrant women may be able to access directly on the grounds of fundamental rights recognized by the Spanish Constitution.

In particular, I will analyse two issues: workplace discrimination and access to justice for migrant domestic workers. The first aspect concerns the single-based or intersectional discrimination disproportionately experienced by third-country national immigrant women – on the grounds of sex, nationality, ethnic origin, migrant status and so forth – in their host country, including in the work realm. The issue of access to justice, on its part, stems from the rigid public/private distinction underlying certain norms regulating domestic work. Although the Spanish context is no exception to the generally low availability of judicial examples of enforcement of fundamental rights in crucial areas for immigrant women workers, I have chosen to focus on these matters because they have been involved in interesting judicial examples offered by Spanish courts.

I. Protection Against Workplace Discrimination

Pursuant arts. 53(4) and 55(5) respectively of the Spanish Workers' Statute, dismissals for objective and disciplinary reasons are invalid if carried out during pregnancy, or during the suspension of employment contracts for maternity or maternity-related issues⁷²⁶, or after the worker has resumed its employed position after the end of this period. Furthermore, dismissals will also be invalid if they are motivated by any ground of discrimination prohibited by the Spanish Constitution or the Spanish law, or when they breach workers' fundamental rights and freedoms.

⁷²⁶ Art. 45(1)(d) of the Statute envisages the possibility of suspending employment contracts due to maternity, health risks during pregnancy, or breastfeeding of babies under nine months, adoption or foster care.

Besides unlawful dismissal, the Spanish Workers' Statute envisages several protections against discrimination on the workplace. First and foremost, art. 4(2)(c) of the Statute includes the right to non-discrimination – on the grounds of sex, marital status, age, racial or ethnic origin, social status, religion, political orientation, sexual orientation, union membership or language – among the basic rights recognised to all workers. The prohibition to discriminate is also specifically established in relation to access to work (art. 16), employment relationships (mostly between employer and employees, *ex art.* 17), access to professional training (art. 23), upward employment mobility (art. 24), pay (art. 28) and dismissal (arts. 53 and 55). With respect to relationships between employees, art. 54(2)(g) provides that any worker committing sexual harassment or harassment on the grounds of racial or ethnic origin, religion or belief, disability, age, sexual orientation or sex, towards the employer or co-workers, will carry out a contractual breach. Therefore, his or her employment contract may be terminated by the employer provided that this breach is considered “serious and intentional”.

The described normative framework appears especially relevant given that the economic crisis not only exacerbated the labour precariousness already disproportionately experienced by immigrant women, but also increased instances of discriminatory behaviour towards immigrants in general in the workplace. In particular, cases of what has been defined as “employment xenophobia” have been observed with more frequency, together with the multiplication of hostile behaviour towards migrants, perceived by national workers as rivals in the effort to secure and maintain a job⁷²⁷. Arguably, women migrant workers are the most exposed to discrimination in the workplace in comparison to both citizen women workers and to immigrant men, due to the fact that many of their features may constitute grounds for unlawful differential treatment: sex, race and ethnic origin, language, nationality, migrant status, residence status, and so forth. As they are often placed at the intersection of two or more of these grounds, their risk of suffering from single-ground, multiple or intersectional discrimination is further heightened. In addition to this, such grounds can generate structural barriers that prevent them from fully accessing legal protections theoretically recognised to them by the law. This, in turn, will give rise to unequal employment relationships and may seriously undermine immigrant women's possibility to oppose unlawful dismissal – thus breaching their fundamental right to equality and non-discrimination on the grounds of sex in

⁷²⁷ RUBIO ARRIBAS, F. J., ‘Aspecto Colateral del Desempleo: la “Xenofobia Laboral”’, 28(4) *Nómaditas. Revista Crítica de Ciencias Sociales y Jurídicas* (2010) 5, pp. 10 – 11.

the field of employment. One of such hurdles, which will be examined here, relates to language barriers hindering immigrant women's understanding of the rights recognised to them by the law.

In the light of these observations, it appears clearly that immigrant women's possibility to enjoy the legal protections envisaged by this framework are strongly dependent on courts' readiness to recognise the complex forms of direct or indirect discrimination which they may suffer on multiple or intersecting grounds. It is therefore crucial to understand whether Spanish Courts have so far interpreted constitutional principles of formal and substantial equality (as well as provisions of Spanish law specifying these principles) in ways that allowed them to offer an effective protection of immigrant women workers against discrimination. Useful hints in this sense have been provided by two examples of judicial responsiveness to phenomena of multiple or intersectional discrimination within the framework of art. 14 of the Constitution.

As to my first example, a recent judicial decision where the actual capability of the described system to effectively respond to the complex issue of discrimination against immigrant women workers was put to test is judgment no. 8384/2012 by the *Tribunal Superior de Justicia* of Catalonia⁷²⁸. The case concerned the disciplinary dismissal of a worker after he had verbally attacked another worker with offences related to the latter's sex as well as her migrant status and national origin (Cuban). Among other complaints, the dismissed worker had argued before the Tribunal that his behaviour could not be considered as a serious and intentional act of discrimination. More specifically, he maintained that the lower court had overlooked the context in which his behaviour had taken place and the fact that he alleged to have been provoked by the victim.

In response, the Tribunal preliminarily recalled the fundamental right to equality and non-discrimination on the grounds of sex to affirm that "the expressions used by the applicant (...) [were] literally offensive and [revealed] an intention not only to offend, but also to denigrate the female condition of the offended person, which affects not only the right to honour, but also the right to non-discrimination on grounds of sex, with derogatory references to the origin of the offended person"⁷²⁹. Then, the Tribunal moved on to consider that the applicant's offensive behaviour was sufficiently serious and intentional to justify a

⁷²⁸ *Tribunal Superior de Justicia de Cataluña, (Sala de lo Social, Sección 1ª), sentencia no. 8384 of 12 December 2012.*

⁷²⁹ *Ibid.*, § 2 of Legal Grounds.

disciplinary dismissal pursuant art. 54(2)(g). Even setting aside the lack of acceptable justifications from the subjective point of view, indeed, “the expressions which the applicant addressed to his co-worker were, from an objective point of view, (...) sufficiently offensive to her honour and personal dignity”⁷³⁰. Therefore, the Tribunal upheld the disciplinary dismissal of the applicant.

Despite its isolated character and the lack of availability of similar judgments in this field, I would argue that the judicial reasoning carried out by the Tribunal in this case is quite significant for our purposes. In this judgment, the fundamental right to equality was used as a fruitful basis to argue that offences directed at female co-workers and based on their sex constitute an attack on their dignity and can justify disciplinary dismissal. Even more importantly, the multiple grounds on which the victim was targeted (being an immigrant, being Cuban, being a woman) did not obscure each other in the Tribunal’s analysis, but were considered as a whole motive for the offences at issue and for the purpose of assessing the gravity of the applicant’s discriminatory behaviour. This open attitude on the Tribunal’s part is also appreciable, in that it shows how broad constitutional principles may effectively adapt to immigrant women’s peculiar experiences of discrimination (single-ground, multiple and intersectional) and ensure a sensitive implementation of the protections envisaged by the Workers’ Statute with respect to immigrant women workers.

The importance of a judicial awareness of multiple discrimination in the workplace is also suggested by judgment no. 8133/2009 of the *Tribunal Superior de Justicia* of Catalonia⁷³¹, concerning the case of an immigrant woman working for a cleaning company who had been dismissed during pregnancy, due to alleged complaints from a client concerning the unsatisfactory quality of her work. Despite the fact that art. 55(5)(b) of the Workers’ Statute clearly establishes the invalidity of all dismissals carried out during pregnancy, the company had the worker sign an agreement where it merely admitted to unfair dismissal and made a sum available to her as compensation and as severance pay. The lower court had therefore declared the dismissal invalid, importantly assessing that the agreement could not have any value also because “the foreign worker did not properly understand its terms”⁷³².

The company turned to the Tribunal, challenging the lower court’s judgment and maintaining that the agreement should have been considered as having releasing effects. The Tribunal’s response is extremely interesting for our purposes. The judgment at issue, indeed,

⁷³⁰ *Ibid.*, § 3 of Legal Grounds

⁷³¹ *Tribunal Superior de Justicia de Cataluña, (Sala de lo Social, Sección 1ª), sentencia no. 8133 of 10 November 2009.*

⁷³² *Ibid.*, § 1 of Legal Grounds.

constitutes a good example of an interpretation of norms applicable to immigrant women workers not simply in a gender-sensitive perspective, but also in a way that takes into account the specific difficulties experienced by them both as women and as migrants in their employment relationships. What is more, such an interpretation was spurred by the consideration of fundamental rights enshrined in the Spanish Constitution.

Firstly, the Tribunal considered that the termination of the employment contract had not occurred on the grounds of an agreement between the company and the worker but as a consequence of the unilateral decision of the company to dismiss her. The existence of an agreement merely indicated that the company aimed at settling on the consequences of the dismissal in order to avoid a lawsuit. Secondly, the court established that “the dismissal [was] radically invalid due to its violation of art. 14 of the Constitution concerning the non-discrimination of women, in its projection on pregnancy”, and it had therefore breached art. 55 of the Workers’ Statute⁷³³. In fact, the Tribunal recalled that “women workers’ risk of losing their employment as a consequence of maternity probably constitutes the most important problem – together with the pay gap – for the effectiveness of the principle of non-discrimination between sexes within employment relationships”⁷³⁴. Spanish law consequently envisages reinforced guarantees for the protection of pregnant workers, which enjoys “a clear constitutional relevance”⁷³⁵. For instance, dismissed pregnant workers are not required to prove that the employer knew about the pregnancy. In this context, the Tribunal recalled not only the fundamental right to equality and non-discrimination, but also the fundamental right to personal and family life enshrined in art. 18(1) of the Constitution as well as women workers’ right for the protection of their health.

Importantly, the Tribunal applied these general principles to the individual situation of the immigrant worker involved by taking into account her specific difficulties as a foreigner working in Spain. From the outset, it conceded that an agreement which substituted the general rule of readmission of the worker with the payment of compensation is admissible in theory. The consequences of the invalidity cannot indeed be extended to imposing readmission to a worker who assesses that this solution is not adequate for his or her own interest. In the specific case at issue, however, the Tribunal considered that these conditions were not observable, because the agreement was concluded “without a full understanding on the workers’ part – who what is more was also a foreign immigrant – on an illegal ground set

⁷³³ *Real Decreto Legislativo 1/1995*, cit.

⁷³⁴ *Tribunal Superior de Justicia de Cataluña*, sentencia no. 8133/2009, cit., § 2 of Legal Grounds.

⁷³⁵ *Id.*

by the employer”⁷³⁶. Therefore, the Tribunal rejected the employer’s claims and upheld the lower court’s decision to declare the agreement as void of any effect.

This judgment constitutes in my view an extremely positive example of how fundamental rights may be used to reinforce the legal protections available to immigrant women workers by shining a light on eventual specific barriers they may find, as women and as foreigners, to the enjoyment of workers’ rights. Here, indeed, the Tribunal rightly detected language barriers that in this specific case prevented it from concluding that the worker had signed the agreement because she had assessed that receiving compensation corresponded to her best interest. I would argue that a similar sensitivity directly stemmed from the fact that the ultimate aim of the legislation at issue was that of protecting women workers’ fundamental right to equality and non-discrimination. In relation to non-discrimination on the grounds of sex, it is quite clear that all of the principles recalled by the Tribunal responded to the need to ensure an effective enjoyment of this constitutional right. Thus, the general possibility for women workers to opt for compensation instead of reintegration in their previous position after an invalid dismissal during pregnancy responds to the need to avoid that a principle established for their protection may produce negative consequences for them. If, in other words, women workers assess that the continuation of the employment relationship does not respond to their best interest because it would prolong the conflict “due to the definitive interruption of personal relationships”⁷³⁷ with the employer – and possibly give rise to further discriminatory treatment – they should be able to conclude a similar agreement. In the specific situation of the immigrant woman involved in judgment no. 8133/2009, however, the Tribunal recognized that an effective realization of her fundamental right to sex equality had not occurred because she had failed to understand all of her legal possibilities and thus she had not been able to make an informed choice. This observation also recalls other grounds of disadvantage beyond sex, i.e., language and migrant status. The Tribunal’s view whereby as a migrant worker she had specific difficulties in understanding the terms and the consequences of the agreement suggests an important judicial awareness of the unequal enjoyment by immigrant women workers of the protections established by the Workers’ Statute. This unequal enjoyment demanded a specification to the general rule allowing the choice between reinstatement and compensation, and prompted the courts’ conclusion that the agreement had to be considered void of any effect.

⁷³⁶ *Id.*

⁷³⁷ *Id.*

II. Access to Justice for Migrant Domestic Workers in Private Households

Mirroring the Italian context, domestic work in Spain is a highly feminised sector in which immigrants predominate⁷³⁸. Domestic work constitutes an important route of first entry and lies at the heart of the regularisation strategies of immigrant women in Spain⁷³⁹. In this sector of the Spanish labour market, however, immigrant women workers experience many of the specific disadvantages characterising this type of employment and linked to the private character of their relationship with employers.

In fact it is precisely the peculiarities of domestic work that were recalled in the Spanish legal order as the main justification for a separate regulation of this profession. Indeed, domestic work in Spain is not regulated by the Workers' Statute but rather by the *Real Decreto* 1620/2011⁷⁴⁰. Its Preamble observes how the specific features of domestic work “justify the need for a different regulation than that of the common labour relationship”. The Preamble, in particular, identifies two peculiarities. The first relates to “the realm where the activity is carried out, which is the family household, strictly linked to personal and family intimacy and entirely alien to the common denominator of employment relationships, which are carried out in the context of productive activities led by the principles of market economy”. The second peculiar feature identified by the Preamble lies in the related “personal ties based on a special trust relationship presiding over the employment relationship between the head of the household and the household workers from its very beginning, a relationship which must not necessarily be present in other types of employment relationships”.

The normative characterisation of domestic work as a special type of employed activity in the Spanish legal order is thus motivated by continuous references to the personalised and intimate quality of the employment relationship as well as of the workplace. However, as I have shown in chapter 1 while discussing the Strasbourg Court's case law on freedom from labour exploitation, carrying out an employed activity in the private and intimate realm of the household may severely isolate the workers – especially live-in ones. In the case of migrant

⁷³⁸ VELA DÍAZ, R., *Empleo, Trabajo y Protección Social de las Mujeres Extranjeras en España: Un Enfoque De Género de la Política Migratoria*, Doctoral Thesis, Faculty of Social and Legal Sciences at the Jaén University, 2013, p. 407 ff.

⁷³⁹ VIDAL, E., VONO, D., ‘La Inserción Laboral de las Mujeres Inmigradas en el Mercado de Trabajo Español’, 57(3) *Documents d'Anàlisi Geogràfica* (2011) 563, p. 569.

⁷⁴⁰ *Real Decreto* 1620/2011, de 14 de noviembre, por el que se regula la relación laboral de carácter especial del servicio del hogar familiar, BOE n. 277 of 17 November 2011.

workers, this isolation may be further aggravated by their migrant or foreigner status. With specific reference to immigrant women in the domestic work sector, it has been noted that the inherent invisibility of this type of work also makes women workers in this sector, especially immigrant ones, equally invisible from a social, economic and legal point of view⁷⁴¹.

Among the perverse effects generated by the features of domestic work identified by Spanish law, in this section I will focus on the particularly crucial matter of access to judicial protection. A commonly observed problem, in particular, concerns the difficulty to carry out labour inspections in private households employing domestic workers due to the obligation to respect employers' fundamental rights such as the right to private life or the principle of inviolability of the domicile⁷⁴². In relation to this matter, law 36/2011⁷⁴³ provides at art. 76 that labour inspections may be carried out in workplaces coinciding with private domiciles against the employer's will (or when there is a risk of opposition on his part) only in presence of a judicial authorisation, also "in order to allow for any other means of inspection or control which may affect fundamental rights or public freedoms".

Thus, the described issue does not simply constitute yet another example of the specific barriers disproportionately experienced by immigrant women to their enjoyment of work-related rights – in this case, because of the perverse effects of the private character of their employment relationships. This instance also provides a good example of the perverse effects that fundamental rights law itself may produce on immigrant women employed as domestic workers. This may occur whenever employers' fundamental right to privacy prevails over immigrant women workers' fundamental right to access justice, including for the protection of their right to be free from exploitation – since barriers to labour inspections may also negatively affect domestic workers' possibility to prove situations of exploitation to which they have been subjected in private household, especially when such a relationship has been carried out informally

A compelling example of how this contrast between competing fundamental rights may play out in a judicial context has been recently offered by the *Tribunal Superior de Justicia* of Andalucía with judgment no. 126/2013⁷⁴⁴. In this case, an undocumented immigrant woman

⁷⁴¹ MESTRE I MESTRE, R. M., 'Trabajadoras de Cuidado: Las Mujeres de Ley de Extranjería', in Checa, F., *Mujeres en el Camino: el Fenómeno de la Migración Femenina en España*, Icaria Editorial, Barcelona, Spain, 2005, p. 148.

⁷⁴² MARTÍN DÍAZ, E., 'Mercado de Trabajo, Género e Inmigración', in VV.AA., *Mujeres Migrantes, Viajeras Incansables*, Harresiak Apurtuz, Bilbao, Spain, 2006, p. 66.

⁷⁴³ Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social, BOE n. 245 of 11 October 2011.

⁷⁴⁴ *Tribunal Superior de Justicia de Andalucía, Sevilla (Sala de lo Social, Sección 1ª)*, Judgment no. 126 of 17 January 2013.

from Cuba experienced the problem of proving her informal employment as a domestic worker in the context of a judicial opposition against her dismissal. Before the court of first instance, she had in fact succeeded in her efforts to prove the existence of her employment relationship notwithstanding the lack of a written contract with her employer, and she had obtained a judicial recognition of the inadmissibility of her dismissal.

Her employer, however, had turned to the Tribunal pursuing a revision of the factual assessment carried out by the lower court in its judgment. In particular, she contested the very existence of an employed relationship between her and the immigrant woman involved. She maintained that she had simply hosted the alleged worker in her home, under the understanding that she would provide the latter with board and keep in exchange for her company. Most importantly, the applicant held that the worker had not submitted irrefutable proof that she had been employed as a domestic worker. In fact, the alleged employee had brought to the lower court's attention several facts that suggested the existence of an employment relationship, but none of them actually constituted conclusive proof in this sense. For instance, she had submitted letters written by her parents in which they thanked the employer for taking their daughter into her home and expressed the hope that she would be treated well. Moreover, she had presented bank documents attesting a regular income until the date of the dismissal, as well as a card from a social centre attesting that she was searching for a job.

In this respect, the Tribunal carried out an extremely sensitive reasoning, considering the proof presented by the alleged employee in the light of her specific difficulties as an undocumented domestic worker employed in a private environment. More specifically, the Tribunal observed that “the special employment relationship of domestic workers owes its special character, among other things, to the subjects of the employment contract – individuals and families rather than companies – as well as to the place where the work is carried out, i.e., the family household, in cohabitation with persons that are not (...) considered a company in the colloquial sense of the word”⁷⁴⁵. On these grounds, the Tribunal rightly assessed that “the submission of irrefutable proof is difficult to accomplish, because this relationship lends itself to situations of familiarity, and because the workplace is located in the domicile of another person, in the light of the principle of inviolability of the latter established by the Constitution, which hampers inspections and even union activity”⁷⁴⁶.

⁷⁴⁵ *Ibid.*, § 5 of Legal Grounds.

⁷⁴⁶ *Id.*

Thus it was the constitutional principle of inviolability of the domicile that lay at the heart of the Tribunal's conclusions. On the one hand, its judgment did not undermine this principle at all. The Tribunal strictly confined itself to analysing the problem of the value of the submitted proof rather than the domestic workers' right to receive labour inspections in the household where she worked in order to obtain irrefutable proof of the existence of her employed activity. Thus, no principle was established with respect to the correct balance between the employer's constitutional right to domicile inviolability and the worker's fundamental right to be free from labour exploitation. On the other hand, the Tribunal mitigated the perverse effects of the principle of domicile inviolability by reaching a conclusion whereby the specificities of domestic work cannot simply justify a separate regulation – and the often implied lesser labour protections – but must also prompt a mitigation of general rules applicable to workers. In this case, therefore, the Tribunal concluded that “in the light of this situation, the irrefutable proof demanded by the [employer] as the only one capable of supporting the [worker's] claim, emerges as practically impossible to present, and therefore those elements which will make up the judge's conviction (...) will rather be indications, presumptions and an assessment of the whole proof in its entirety”⁷⁴⁷. Therefore, the Tribunal concluded that the lower court had rightly assessed the existence of an employment relationship on the grounds of the facts submitted by the applicant domestic worker and ruled in favour of the latter.

Judgment no. 126/2013 constitutes an isolated yet significant example of the fact that fundamental rights-based claims for the recognition of interests competing with those of immigrant domestic workers may not necessarily reinforce the perverse effects of the extremely private character of the latter's employment relationships. In fact, when interpreted on the grounds of an organic view of the situation of disadvantage often experienced by domestic workers, fundamental rights may support a judicial correction of these perverse effects. In this case, for instance, the judicial references to the constitutional principle of domicile inviolability actually shed light on the normally invisible situation of isolation experienced by domestic workers, and worked in favour of the initial applicant – pushing for the recognition of her specific difficulties in gathering proof of the existence of her employment relationship.

⁷⁴⁷ *Id.*

c. Overall Influence of Fundamental Rights Law on Immigrant Women's Enjoyment of Workers' Rights

The judgments examined in this section have provided examples of the positive role that fundamental rights may play *vis-à-vis* gendered shortcomings observable in the structure or the application of certain norms of Spanish law. At the same time, the discussed decisions also confirm that a gender-sensitive interpretation of fundamental rights is crucial in order to prevent this source itself from further reinforcing these shortcomings.

Positive examples in this sense were constituted by the cases concerning employment discrimination. Here, it emerged clearly that immigrant women's possibility to fully enjoy legal protections against discrimination in the workplace on an equal footing with citizen women (and to effectively enjoy their fundamental right to non-discrimination on the grounds of sex) is also strictly related to a judicial awareness of other forms of discrimination on intersecting or combining grounds, such as language and migrant status. Another interesting aspect emerging from the analysed case law concerns the capability of fundamental rights to fruitfully interact with each other in order to produce positive results for the immigrant women workers involved. In the case concerning sexist and racist attacks towards a Cuban employee, I observed how the court's connection between the right to honour and dignity of the discriminated worker and her right to sex equality prompted a judicial recognition of the legitimacy of a disciplinary dismissal against the discriminating worker. The risk that fundamental rights themselves may disproportionately and negatively hamper immigrant women's enjoyment of workers' rights was also confirmed in relation to access to justice for domestic workers. Here, the analysed judgment offered an interesting example of interpretation of the constitutional principle of inviolability of the domicile sensitive to the specific difficulties experienced by domestic workers in proving the existence of their employment relationship.

Useful cues concerning a possible legal strategy to pursue judicial interpretations of both fundamental rights and national norms in the light of immigrant women's specific difficulties were provided by the examined cases on continuous employment or "active search" requirements. On the one hand, this area was not immune from judicial discourses perpetuating the breadwinner assumption of the discussed norms – and reinforcing their disparate impact on immigrant women's access to residential stability in conditions of equality with immigrant men. On the other hand, I stressed that fundamental rights-based

discourses encouraged a contextual interpretation of biased norms by the competent courts. Arguably, this constitutes a positive result in itself, due to the great potential of a similar approach to shine a light on immigrant women workers' multiple barriers to an effective enjoyment of rights and entitlements theoretically recognised to them by Spanish law.

In the examined judgments, it is possible to observe that even when fundamental rights-based argumentations were not powerful enough to justify a ruling in favour of the immigrant women workers involved, at the very least they prompted a judicial analysis that was significantly more attuned to the peculiarities of the individual case. This, in turn, allowed competent courts to recognise the specific difficulties experienced by immigrant women in enjoying workers' rights – marking a first step towards the enjoyment of said rights in conditions of equality and non-discrimination. What is more, this equalising effect was produced with respect to both citizen women (for example in relation to access to legal protections against unlawful dismissal during pregnancy despite language barriers) and immigrant men (as for instance in the examined judgments concerning care burdens versus continuous work requirements).

5. Concluding Remarks

In this chapter, I discussed several provisions of Spanish law that are in my view particularly relevant from the perspective of immigrant women working and residing in Spain. In the realm of family life, the majority of these norms were subsequently reformed, while in the field of employment these norms are still in force. In this respect, the gender bias of the norms highlighted in this chapter can be ascribed to two main problems. Interestingly, these problems correspond to what I observed with reference to the Italian case study. A first source of perverse, gendered effects of specific Spanish rules applicable to immigrant women is the lack of normative consideration of the specific difficulties and burdens that this category experiences. For instance, I have discussed how the previously in force legal requirement whereby immigrants had to submit an employment contract in order to sponsor family reunification disproportionately hindered immigrant women's possibilities to enjoy family life in Spain. Another fitting example in this regard are the current strict legal prerequisites of continuous employment or active search for employment for the purpose of obtaining the renewal of residence and work permits.

Against this background, the aim of this chapter was to enquire into the effects of the multi-level system of protection of fundamental rights in force in the Spanish order on the observed shortcomings. While the lack of a substantial case law on significant issues for immigrant women suggests that a sweeping assessment of such an impact would be farfetched, the examined judicial examples prompt several insights. Firstly, much of the observable impact of fundamental rights on legal norms in crucial areas of immigrant women's family life and employment concerned their reinforcement or conversely their disestablishment of the one breadwinner model implied or allowed by these norms. Thus, the Spanish case study reproduces a feature that was already revealed in the previous chapters, both at supranational and national level. The fact that fundamental rights law, and in some cases the very same constitutional provisions, may alternatively enforce or overturn a deeply gendered breadwinner model suggests that the judicial interpretation of this source is key for immigrant women's enjoyment of their rights in the field of family life and employment. This was further confirmed by the observation of examples of judicial balance between competing fundamental rights, which presented a high risk of producing an indirect discrimination against immigrant women in relation to protection against domestic violence and access to justice for the recognition of their rights as workers. Therefore, a gender-sensitive judicial interpretation of fundamental rights emerges as an indispensable prerequisite for the capability of this source to effectively expose and correct gendered shortcomings of rules applicable to immigrant women.

In relation to perspectives for future development, a crucial effect of fundamental-rights based claims in some of the examined examples was that of prompting a contextual judicial interpretation of the norms at issue. This, in my view, suggests a strong future potential of fundamental rights to prompt gender-sensitive interpretations of domestic rules. In particular, the very fact that fundamental rights-based discourses encouraged a judicial consideration of the situation of the specific applicants not as isolated individuals, but as individuals *in context*, suggests that this can constitute a fruitful judicial strategy to shine a light on the factual and legal barriers to immigrant women's enjoyment of their rights in the field of family and employment in conditions of equality and non-discrimination – and thus to unveil the indirect discrimination against this group which is often produced by law's overlooking of such barriers.

CONCLUSIONS

This thesis originated from the observation that law, and primarily – but not exclusively – immigration law, can disproportionally and negatively affect immigrant women's access to their rights and entitlements in conditions of equality and non-discrimination in the fields of family life and employment. My aim was to verify whether European human rights law has thus far constituted an effective ground to contrast this disparate impact, as well as to test its potential and shortcomings in this regard. Therefore, in this thesis I carried out a twofold research. A first layer of my inquiry consisted in delving into the specific gendered shortcomings of European and national immigration law and of other legal sources applicable to immigrant women. Then, a second and most important layer of research concerned the rich, continually evolving, and multilevel human and fundamental rights framework in force in Europe. In this context, I explored the judicial impact of this framework *vis-à-vis* ostensibly neutral but essentially biased norms applicable to immigrant women living and working in the European legal space.

On a general note, my research reveals that there is no definite answer to the question of whether human and fundamental rights law enjoys a supposedly inherent capability to effectively unveil and contrast the gender bias of legal norms applicable to immigrant women. Human and fundamental rights *per se* are neither infallible tools of analysis, capable of automatically prompting a gender-sensitive interpretation or implementation of legal norms, nor are they inevitably useless or even harmful sources. By analysing meaningful examples of their judicial application to crucial aspects of immigrant women's rights in the fields of family life and employment at supranational and national level, the most consistent lesson that I have learned concerns the fact that human and fundamental rights law can alternatively serve to contrast or to reinforce gendered shortcomings of legal norms applicable to this group. In this respect, their judicial interpretation emerged as an essential aspect for either result.

Among the shortcomings of European human and fundamental rights law observed throughout this thesis, the one that best illustrates the importance of interpretation concerns the fact that this source was used by national and supranational courts to alternatively reject and reinforce deeply gendered and indirectly discriminatory models enforced by legal norms applicable to immigrant women. In fact, and at all levels of my analysis, the reinforcement of said models occurred with more frequency than their rejection. Thus, human and fundamental

rights were used to legitimise the legal and judicial imposition of abstract models of “good mothers”, or of a one-breadwinner family, or of a family based on a rigid and gendered distinction between productive and reproductive work. Interestingly, the indirect discrimination that resulted affected immigrant women both in comparison to immigrant men and with citizen women, because these models were not only deeply gendered but also dated—and thus no longer imposed on national women (or no longer imposed with the same intensity).

In this light, a key question concerns what strategies should be pursued in order to steer judicial interpretations of human and fundamental rights away from reproducing the gendered shortcomings of legal norms applicable to immigrant women. I believe that an important answer to this question concerns one specific feature that was observable in the most successful judicial examples examined in this thesis, i.e., the capability of human and fundamental rights to prompt a contextual interpretation of legal norms applicable to immigrant women. At both supranational and domestic level, indeed, a judicial awareness of the disparate impact of specific norms on immigrant women was prompted by the consideration of the applicants not as isolated individuals, but rather as individuals in context. Interestingly, this context may be constituted by the society as a whole as was the case of the *Abdulaziz et al.* judgment before the ECHR, or of the judicial examples concerning continuous work requirements in the Spanish case study, or with the family, as was the case of the ECJ case law on carers’ access to residence rights, or of the judicial examples concerning carers’ access to family reunification examined in the context of the Italian and Spanish case studies. Even more importantly, some of the discussed examples revealed a judicial analysis of immigrant women in the context of domestic law as a whole, which allowed competent courts to unveil how certain violations of immigrant women’s rights stemmed from the interaction of norms traditionally assigned to different legal realms. This type of assessment, for instance, was carried out by the ECHR in the *Rantsev* judgment, or by the Italian Court of Novara in the judicial example concerning immigrant women’s access to legal protections against domestic violence. Despite the rarity of similar cases, I argue that this perspective is extremely valuable because it allows competent courts to capture immigrant women’s complex experiences of discrimination and exclusion as a consequence not of factual difficulties but of legal factors. In the mentioned examples, for instance, only a consideration of the involved immigrant women in the context of the broader legal system (and not simply in the context of immigration law) revealed that the protections envisaged by

domestic criminal laws against violence and exploitation were rendered moot by apparently neutral norms of immigration law, or by apparently neutral interpretations of said norms by the national authorities.

Arguably, the analysis carried out in this thesis suggests that the described contextual interpretation is neither a necessary consequence of fundamental rights-based judicial claims, nor an automatic trigger of judicial recognition of the disparate impact of certain norms on immigrant women specifically. In connection to this I want to stress that while in the *Rantsev* judgment and in the Spanish judicial example the recognition of human and fundamental rights violations resulted from a contextual interpretation of problematic norms of immigration law, the disparate impact on immigrant women produced by the latter remained in the background. In other cases, such as the ECJ case law on carers and the judicial examples from the Spanish case study concerning continuous work requirements, the contextual interpretation carried out by competent courts on the grounds of human and fundamental rights did not even prevent the perpetuation of discriminatory legal tropes such as the rigid distinction between productive and reproductive work and the one-breadwinner model.

The cases in which, conversely, the contextual interpretations triggered by human and fundamental rights realised their full potential to unveil the disproportionate and negative effects of certain legal norms on immigrant women were those involving the judicial assessment of possible violations of the right to equality and non-discrimination, in conjunction with other rights. This was the case, for instance, of the *Abdulaziz et al.* judgment, and of the judicial examples from the Italian case study concerning immigrant women's access to sponsorship of family reunification on the grounds of unpaid care work and to protection against domestic violence. Here, indeed, the contextual interpretation carried out by competent courts on the grounds of immigrant women's right to enjoy their human and fundamental rights in conditions of equality with both immigrant men and citizen women prompted a judicial recognition of the disparate impact on this group stemming from the legal enforcement of gendered models or from a harmful interaction of norms from different legal realms. Thanks to the adoption of this point of view, human and fundamental rights law constituted an effective ground to recognise the indirect discrimination suffered by the involved immigrant women as a consequence of gender-insensitive norms or of a gender-sensitive implementation of such norms.

In sum, contextual judicial interpretations of biased norms applicable to immigrant women in the light of their fundamental right to equality and non-discrimination should be further encouraged, not only for the beneficial effects produced thus far in individual judicial examples, but also because of its potential for development in other fields. Its capability to highlight the many forms of subordination and disempowerment experienced by immigrant women within the family, the host society, and the host country's legal system, indeed, makes this approach fruitfully applicable to all of the observed shortcomings in the fields of family life and employment equally.

In conclusion, human and fundamental rights law emerges from this thesis as a powerful tool of protection for immigrant women in the European legal space, but also as a possible ground of reinforcement of heavily gendered legal discourses. In order to fully realise the positive potential of the multi-level and synergic system of human and fundamental rights protection in force in the European legal space, it is crucial to develop effective strategies capable of encouraging a gender-sensitive interpretation of this source by supranational and national courts. The perspectives opened by my analysis encourage further investigation into the ongoing and future developments in human and fundamental rights law in the field of gender and migration with eager curiosity.

BIBLIOGRAPHY

Primary Sources

I. International and European Legislation

a. Hard Law

Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entered into force on 3 September 1953 (CETS No. 005)

Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 20 March 1952, entered into force on 18 May 1954, CETS No. 9

Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 of 19 October 1968

International Convention on the Elimination of All Forms of Racial Discrimination, adopted on 21 December 1965, entered into force on 4 January 1969 (UNTS vol. 660, p. 195)

Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, O.J. L 172, 28 June 1973

International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966 and entered into force on 3 January 1976, UNTS vol. 993, p. 3

Optional Protocol to the International Covenant on Civil and Political Rights, adopted on 16 December 1966 and entered into force on 23 March 1976, UNTS vol. 999, p. 171

Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted on 24 June 1975 and entered into force on 9 December 1978

Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 18 December 1979, entered into force on 3 September 1981, UNTS vol. 1249, p. 13

Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 22 November 1984 and entered into force on 1 November 1988, CETS no. 117

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted on 18 December 1990 and entered into force on 1 July 2003, UNTS vol. 2220, p. 3

Treaty on European Union, O. J. C 191 of 29 July 1992

Association Agreement between the Communities and Poland, signed in Brussels on 16 December 1991, entered into force on 1 February 1994

Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, adopted in Belém do Pará (Brazil) on 9 June 1994

Association Agreement between the Communities and the Czech Republic, signed in Luxembourg on 4 October 1993 and entered into force on 1 February 1995

European Social Charter (Revised), signed on 3 May 1996, entered into force on 1 July 1999 (CETS No. 163)

Treaty Of Amsterdam Amending The Treaty On European Union, The Treaties Establishing The European Communities And Related Acts, O. J. C 340, 10 November 1997

Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O. J. L 180/22 of 19 July 2000

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, O. J. L 303/16 of 2 December 2000

Charter of Fundamental Rights of the European Union, O.J. C 364 of 18 December 2000

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, adopted on 6 October 1999 and entered into force on 22 December 2000, UNTS vol. 2131, p. 83

Treaty of Nice Amending the Treaty on the European Union, The Treaties Establishing The European Communities And Certain Related Acts, O. J. C 80, 10 March 2001

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the United Nations General Assembly with resolution 45/158 of 18 December 1990 and entered into force on 1 July 2003 (2220 UNTS 3)

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, O.J. L 251/12 of 3 October 2003

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, O.J. L 16/44 of 23 January 2004

Rules of the European Committee of Social Rights, adopted on 29 March 2004, available at http://www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/ESCRRules_en.asp [last accessed on 8 July 2014]

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, O.J. L 158/77 of 30 April 2004

Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, O. J. L 373/37 of 21 December 2004

Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, O. J. L 289 of 3 November 2005

Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), O. J. L 204/23 of 27 July 2006

Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, O.J. C 306 of 17 December 2007

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted on 10 December 2008 and entered into force on 5 May 2013

Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, O.J. L 155/17 of 18 June 2009

Charter of Fundamental Rights of the European Union, O.J. C 83/389 of 30 March 2010

Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, entered into force on 1 June 2010

Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, adopted on 12 April 2011, entered into force on 1 August 2014, CETS No. 210

Convention Concerning Decent Work for Domestic Workers, adopted on 16 June 2011 and entered into force on 5 September 2013

Directive 2011/98/EC of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, O.J. L 343/1 of 23 December 2011

Council of Europe, *Fifth Negotiation Meeting Between the CDDH ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights*, Final Report to the CDDH, 3 -5 April 2013, Strasbourg, available at [http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf) – last accessed on 12 February 2014.

b. Soft Law

Committee on the Elimination of Discrimination Against Women, General Recommendation no. 19 on violence against women, 11th Session, 1992

Tampere European Council, Presidency Conclusions 15 and 16 October 1999

Commission of the European Communities, *Proposal for a Council Directive on the Right to Family Reunification*, COM(1999) 638, 1 December 1999

United Nations Commission on Human Rights, Resolution 2003/45 on the Elimination of Violence Against Women, 23 April 2003

Council of the European Union, 2618th Justice and Home Affairs Council Meeting, *Common Basic Principles for Immigrant Integration Policy in the European Union*, 19 November 2004

The Hague Programme Strengthening Freedom, Security and Justice in the European Union(2005/C 53/01), O. J. C53 of 3 March 2005

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *A Common Agenda For Integration: Framework for the Integration of Third-Country Nationals in the European Union*, COM(2005) 389, 1 September 2005

Opinion of Advocate General Kokott, *Parliament v. Council* (C-540/03, delivered on 8 September 2005).

Parliamentary Assembly of the Council of Europe, Recommendation 1732(2006) on the Integration of Immigrant Women in Europe, adopted on 24 January 2006

Explanations Relating to the Charter of Fundamental Rights, O.J. C 303/17 of 14 December 2007

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Common Immigration Policy for Europe: Principles, Actions and Tools*, COM(2008) 359, 17 June 2008

Council of the European Union, Declaration of the Presidency, *European Ministerial Conference on Integration* (Vichy 3-4 November 2008), 29 October 2008

Committee on the Elimination of Discrimination against Women, *General Recommendation No. 26 on Women Migrant Workers*, 5 December 2008, CEDAW/C/2009/WP.1/R.

Parliamentary Assembly of the Council of Europe, Resolution 1697(2009) on *Migrant Women: at Particular Risk of Domestic Violence*, adopted on 20 November 2009

European Commission, Proposal for a Directive of the European Parliament and of the Council on conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer of 13 July 2010, COM(2010) 378

European Commission, Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment of 13 July 2010, COM(2010) 379

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Strategy for Equality Between Women and Men 2010 – 2015*, COM (2010) 491, 21 September 2010

Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, Doc. 12549, 24 March 2011

International Labour Organization, *Convention Concerning Decent Work for Domestic Workers*, No. 189 (2011), adopted on 16 June 2011, 100th ILC Session

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *European Agenda for the Integration of Third-Country Nationals*, COM(2011) 455, 20 July 2011

II. National Legislation

a. Italy

Legge no. 555 of 13 June 1912

Codice Penale, Regio Decreto no. 1398 of 19 October 1930

Regio Decreto no. 148 of 8 January 1931

Costituzione della Repubblica Italiana, G.U. no. 298 of 27 December 1947

Legge n. 158 of 10 April 1981, *G.U.* no. 116 of 29 April 1981

Codice di Procedura Penale, D.P.R. no. 447 of 22 September 1988

Decreto Legislativo no. 286 of 25 July 1998, or *Testo Unico delle Disposizioni Concernenti la Disciplina dell'Immigrazione e Norme sulla Condizione dello Straniero*, *G.U.* no. 191 of 18 August 1998, S.O.

Decreto del Presidente della Repubblica n. 394 of 31 August 1999, *G.U.* no. 258 of 3 November 1999, S.O.

Decreto Legislativo n. 151 of 26 March 2001, *Testo Unico sulla Maternità e Paternità*, *G.U.* no. 151 of 26 March 2001

Legge no. 154 of 4 April 2011, *G.U.* no. 98 of 28 April 2001

Decreto Legislativo no. 216 of 9 July 2003, *G.U.* no. 187 of 13 August 2003

Decreto Legislativo no. 215 of 2003, *G.U.* no. 186 of 12 August 2003

Decreto del Presidente della Repubblica no. 334 of 18 October 2004, *G.U.* no. 33 of 10 February 2005

Decreto Legislativo no. 198 of 11 April 2006, *Codice delle Pari Opportunità*, *G.U.* no. 125 of 31 May 2006

Circolare del Ministero del Lavoro no. 34 of 13 December 2006

Decreto Legislativo n. 30 of 6 February 2007, implementing Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *G.U.* no. 72 of 27 March 2007

Circolare del Ministero dell'Interno of 3 September 2007

Legge n. 102 of 3 August 2009, *G.U.* no. 179 of 4 August 2009

Circolare del Ministero dell'Interno no. 664 of 5 February 2009, *Conversione del Permesso di Soggiorno per Cure Mediche in Motivi Familiari*

Decreto Legislativo no. 5 of 25 January 2010, *G.U.* no. 29 of 5 February 2010

Circolare del Ministero dell'Interno e del Ministero del Lavoro e delle Politiche Sociali of 25 February 2011

Decreto Legge no. 93 of 14 August 2013

Legge no. 119 of 15 October 2013, G.U. no. 242 of 15 October 2013

Legge no. 77 of 27 June 2013, G.U. no. 152 of 1 July 2013

b. Spain

Real Decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal

Constitución Española, passed on 31 October 1978 and ratified by referendum on 6 December 1978, *BOE* no. 311 of 29 December 1978

Ley Orgánica sobre derechos y libertades de los extranjeros en España n. 7 of 1 July 1985, *BOE* no. 158 of 3 July 1985

Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, *BOE* no. 75 of 29 March 1995

Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral, *BOE* no. 86 of 11 April 1995

Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, *BOE* no. 281 of 24 November 1995

Ley Orgánica 14/1999, de 9 de junio, de modificación del Código Penal de 1995, en materia de protección a las víctimas de malos tratos y de la Ley de Enjuiciamiento Criminal, *BOE* no. 138 of 10 June 1999

Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, *BOE* no. 10 of 12 January 2000

Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de Enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no.307 of 23 December 2000

Ley Orgánica 27/2003, de 31 de julio, reguladora de la Orden de Protección de las víctimas de la violencia doméstica, BOE no. 183 of 1 August 2003

Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros, BOE no. 234 of 30 September 2003

Ley Orgánica 13/2003, de 24 de octubre, de reforma de la Ley de Enjuiciamiento Criminal en materia de prisión provisional, BOE no. 257 of 27 October 2003

Ley Orgánica 14/2003, de 20 de noviembre, de Reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, modificada por la Ley Orgánica 8/2000, de 22 de diciembre; de la Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local; de la Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, y de la Ley 3/1991, de 10 de enero, de Competencia Desleal, BOE no. 279 of 21 November 2003

Ley Orgánica 15/2003, de 25 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, BOE no. 283 of 26 November 2003

Ley n. 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y del orden social, BOE no. 313 of 31 December 2003

Ley Orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género, BOE no. 313 of 29 December 2004

Real Decreto 2393/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 6 of 7 January 2005

Real Decreto 1019/2006, de 8 septiembre, por el que se modifica al artículo 13 del Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, aprobado por Real Decreto 2393/2004, de 30 de diciembre, BOE no. 28 of 23 September 2006

Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo, BOE no. 51 of 28 February 2007

Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres, BOE no. 71 of 23 March 2007

Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 299 of 12 December 2009

Real Decreto 577/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por la Ley Orgánica 2/2009, BOE no. 103 of 30 April 2011

Ley Orgánica 10/2011, de 27 de julio, de modificación de los artículos 31 bis y 59 bis de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, BOE no. 180 of 28 July 2011

Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social, BOE no. 245 of 11 October 2011

Real Decreto 1620/2011, de 14 de noviembre, por el que se regula la relación laboral de carácter especial del servicio del hogar familiar, BOE no. 277 of 17 November 2011

Ley 22/2013, de 23 de diciembre, de Presupuestos Generales del Estado para el año 2014, BOE no. 309 of 256 December 2013

c. The Netherlands

Dutch Aliens Act, 1994 (*Vreemdelingenwet 1994*)

Aliens Act Implementation Guidelines, 1994 (*Vreemdelingencirculaire 1994*)

d. United Kingdom

Immigration Rules (HC 395 of 1994 as amended by Cm 5597 of 22 August 2002)

III. Case Law

International

a. European Court of Human Rights

Abdulaziz, Cabales and Balkandali v. the United Kingdom, application no. 9214/80; 9473/81; 9474/81, judgment of 25 May 1985

Gül v. Switzerland, application no. 23218/94, judgment of 19 February 1996

Ahmut v. the Netherlands, application no. 21702/93, judgment of 28 November 1996

Knel and Veira v. the Netherlands (First Section), application no. 39003/97, decision of 5 September 2000 (inadmissible)

P.R. v. the Netherlands (First Section), application no. 39391/98, decision of 7 November 2000 (inadmissible)

Lahnifi v. the Netherlands (First Section) application no. 39329/98, decision of 13 February 2001 (inadmissible)

Hugh Jordan v. the United Kingdom (Third Section), application no. 24746/94, judgment of 4 May 2001

Boultif v. Switzerland (Second Section), application no. 54273/00, judgment of 2 August 2001

Mensah v. the Netherlands (First Section), application no. 47042/99, decision of 9 October 2001 (inadmissible)

Adnane v. the Netherlands (Second Section) application no. 50568/99, decision of 6 November 2001 (inadmissible)

Şen v. the Netherlands (First Section), application no. 31465/96, judgment of 21 December 2001

I.M. v. the Netherlands (Second Section), application no. 41226/98, decision of 25 March 2003 (inadmissible)

Chandra and Others v. the Netherlands (Second Section), application no. 53102/99, decision of 13 May 2003 (inadmissible)

Koua Poirrez v. France (Second Section), application no. 40892/98, judgment of 30 September 2003

Ramos Andrade v. the Netherlands (Second Section), application no. 53675/00, decision of 6 July 2004

Hoogendijk v. the Netherlands (First Section), application no. 58641/00, decision of 6 January 2005 (inadmissible)

Benamar and Others v. the Netherlands (Third Section), application no. 43786/04, decision of 5 April 2005 (inadmissible)

Magoke v. Sweden (Second Section), application no. 12611/03, decision of 14 June 2005 (inadmissible)

Siliadin v. France (Second Section), application no. 73316/01, judgment of 26 July 2005

Haydarie v. the Netherlands (Third Section), application no. 8876/04, decision of 20 October 2005 (inadmissible)

Tuquabo-Tekle and Others v. the Netherlands (Third Section), application no. 60665/00, judgment of 1 December 2005

Rodrigues da Silva and Hoogkamer v. the Netherlands (Second Section), application no. 50435/99, judgment of 31 January 2006

Stec and Others v. the United Kingdom (Grand Chamber), applications nos. 65731/01 and 65900/01, judgment of 12 April 2006

Üner v. the Netherlands (Grand Chamber), application no. 46410/99, judgment of 18 June 2006

Konstantinov v. the Netherlands (Third Section), application no. 16351/03, judgment of 26 April 2007

Kontrová v. Slovakia (Fourth Section), application No. 7510/04, judgment of 31 May 2007

D.H. and others v. the Czech Republic (Grand Chamber), application no. 57325/00, judgment of 13 November 2007

Bevacqua v. Bulgaria (Fifth Section), application no. 71127/01, judgment of 12 June 2008

Branko Tomašić and Others v. Croatia (First Section), application no. 46598/06, judgment of 15 January 2009

Opuz v. Turkey (Third Section), application no. 33401/02, judgment of 9 June 2009

Moskal v. Poland (Fourth Section), application no. 10373/05, judgment of 15 September 2009

E.S. and Others v. Slovakia (Fourth Section), application no. 8227/04, judgment of 15 September 2009

Rantsev v. Cyprus and Russia (First Section), application no. 25965/04, judgment of 7 January 2010

Oršuš and others v. Croatia (Grand Chamber), application no. 15766/03, judgment of 16 March 2010

A. v. Croatia (First Section), application no. 55164/08, judgment of 14 October 2010

O'Donoghue and Others v. the United Kingdom (Fourth Section), application no. 34846/07), judgment of 14 December 2010

Andrle v. the Czech Republic (Fifth Section), application no. 6268/08, judgment of 17 February 2011

Nunez v. Norway (Fourth Section), application no. 55597/09, judgment of 28 June 2011

B.S. v. Spain (Third Section), application no. 47159/08, judgment of 24 July 2012

C.N. et V. c. France (Fifth Section), application no. 67724/09, judgment of 11 October 2012

C.N. v. the United Kingdom (Fourth Section), application no. 4239/08, judgment of 13 November 2012

O.G.O. v. the United Kingdom (Fourth Section), application no. 13950/12 (pending)

Horvát and Kiss v. Hungary (Second Section), application no. 11146/11, judgment of 29 January 2013

Valiulienė v. Lithuania (Second Section), application no. 33234/07, judgment of 26 March 2013

Kawogo v. the United Kingdom (Fourth Section), application no. 56921/09, decision of 3 September 2013 (struck off the list).

Kawogo v. the United Kingdom, INTERIGHTS, third-party intervener brief in the *Kawogo* case, available at <http://www.interights.org/search-results-summary/index.html?term=kawogo&area=all> [last accessed on 29 April 2013]

S.A.S. v. France (Grand Chamber), application no 43835/11, judgment of 1 July 2014

b. European Court of Justice

Case 267/83, *Diatta*, judgment of 13 February 1985, ECR 567

Case C- 268/99, *Jany and Others*, Judgment of 20 November 2001, ECR I-8615

Case C-60/00, *Carpenter*, Judgment of 11 July 2002, ECR-I 6305

Case C- 413/99, *Baumbast and R.*, judgment of 17 September 2002, ECR I-07091

Case C-200/02, *Zhu and Chen*, Judgment of 19 October 2004, ECR I-9951

Case C- 540/03, *Parliament v. Council*, judgment of 27 June 2006, ECR I-05769

Case C- 54/07, *Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v. Firma Feryn*, Opinion of Advocate General Poiares Maduro, delivered on 12 March 2008

Case C- 54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn NV*, judgment of 10 July 2008, ECR I-5187

Case C- 578/08, *Chakroun*, judgment of 4 March 2010, ECR I-01839

Case C-34/09, *Ruiz Zambrano*, judgment of 8 March 2011, ECR I-01177

Case C-434/09, *McCarthy*, judgment of 5 May 2011, ECR I-03375

Cases C-483/09 and C-1/10 (joined), *Gueye and Salmerón Sánchez*, Opinion of Advocate General Kokott, delivered on 12 May 2011

Cases C-159/10 and C-160/10, *Gerhard Fuchs and Peter Köhler v. Land Hessen*, judgment of 21 July 2011, ECR I-06919

C-483/09 and C-1/10, *Gueye and Salmerón Sánchez*, judgment of 15 September 2011, ECR I-08263

Case C-256/11, *Dereci et al.*, judgment of 15 November 2011, ECR I-11315

Case C-415/10, *Galina Meister v. Speech Design Carrier Systems GmbH*, judgment of 19 April 2012, not yet published in ECR

Case C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, judgment of 5 July 2012, not yet published in ECR

Case C-40/11, *Iida*, judgment of 8 November 2012, not yet published in ECR

Cases C-356/11 and C-357/11 (joined), *O. and S.*, judgment of 6 December 2012, not yet published in ECR

Case C-86/12, *Alokpa and Moudoulou*, judgment of 10 October 2013, not yet published in ECR

c. Committee on the Elimination of Discrimination Against Women

Communication No. 6/2005, *Fatma Yildirim [deceased] v. Austria*

d. European Committee of Social Rights

Conclusions

Conclusions II, Statement of Interpretation, article 18, 31 July 1971

Conclusions 2003, Vol. 2 (Sweden), article 18, 18(3), 30 June 2003

Conclusions 2005, Vol. 2 (Slovenia), article 18, 18(3), 9 March 2005

Conclusions XVII-2, Vol. 1. (Finland), article 18, 18(3), 30 June 2005

Conclusions XVII-2, Vol. 1 (Iceland), article 18, 18(3), 30 June 2005.

Conclusions 2005, Vol. 2 (Sweden), article 18, 18(3), 3 September 2005

Conclusions XIX-1 (Germany), article 18, 18(3), 24 October 2008

Conclusions 2008, vol. 2 (Slovenia), article 18 and 18(3), 24 October 2008

Conclusions 2008, Vol. 2 (Sweden), article 18, 18(3), 24 October 2008

Conclusions XIX-1 (Turkey), article 18, 18(3), 24 October 2008

Decisions

International Federation of Human Rights Leagues (FIDH) v. France (complaint no. 14/2003, decision of 3 November 2004)

Defence for Children International (DCI) v. the Netherlands (complaint no. 47/2008, decision of 20 October 2009)

Conference of European Churches (CEC) v. the Netherlands (complaint no. 90/2013, decision on immediate measures of 25 October 2013)

e. Inter-American Court of Human Rights

Inter-American Court of Human Rights, *González et al. ("Cotton Field") v. Mexico* of 13 November 2009

National

a. Italian Case Law

Corte Costituzionale, sentenza no. 120 of 15 November 1967

Corte Costituzionale, sentenza no.120 of 23 November 1967

Corte Costituzionale, sentenza no.126 of 16 December 1968

Corte Costituzionale, sentenza no. 104 of 19 June 1969

Corte Costituzionale, sentenza no. 183 of 18 December 1973

Corte Costituzionale, sentenza no. 87 of 9 April 1975

Corte Costituzionale, sentenza no. 1 of 14 January 1987

Corte Costituzionale, sentenza no. 28 of 12 January 1995

Corte Costituzionale, sentenza no. 376 of 12 July 2000

TAR Trieste, sentenza no. 710 of 30 November 2001

Tribunale di Vicenza, ordinanza of 6 May 2002

Tribunale di Bologna, ordinanza of 14 November 2002

Tribunale di Torino, ordinanza of 10 March 2004

Consiglio di Stato, Sezione VI, sentenza no. 4541 of 3 May 2005

Corte Costituzionale, sentenza no. 432 of 28 November 2005

Corte di Cassazione Penale, Sezione III, sentenza no. 6329 of 20 January 2006

TAR Ancona, sezione I, sentenza no. 10 of 27 January 2006

TAR Bologna, I sezione, sentenza no. 105 of 31 January 2006

TAR Ancona, sezione I, sentenza no. 1130 of 10 November 2006

TAR Torino, sezione III, sentenza no. 4166 of 13 November 2006

Corte Costituzionale, ordinanza n. 444 of 6 December 2006

Corte Costituzionale, sentenza no. 348 of 22 October 2007

Corte Costituzionale, sentenza no. 349 of 22 October 2007

Tribunale di Vicenza, decreto of 10 January 2008

TAR Venezia, sezione III, sentenza no. 2648 of 3 September 2008

TAR Venezia, sezione III, sentenza no. 3681 of 26 November 2008

Tribunale di Milano, sezione lavoro, ordinanza of 20 July 2009

Tribunale di Brescia, sezione lavoro, ordinanza of 25 September 2009

Tribunale di Milano, sezione lavoro, decreto of 11 January 2010

Tribunale di Novara, sentenza of 1 March 2010

Corte di Cassazione Penale, sezione IV, sentenza of 12 March 2010 n. 25138

Corte Costituzionale, ordinanza no. 138 of 23 March 2010

Tribunale di Milano, sezione lavoro, ordinanza of 30 July 2010

Tribunale di Milano, sezione lavoro, ordinanza of 4 April 2011

TAR Torino, sezione III, sentenza no. 385 of 15 April 2011

TAR Napoli, sentenza no. 2253 of 20 April 2011

Corte Costituzionale, sentenza no. 187 of 26 May 2010

TAR Venezia, sezione III, sentenza no. 994 of 14 June 2011

TAR Venezia, sezione III, sentenza no. 179 of 7 February 2012

Corte Costituzionale, sentenza no. 31 of 15 February 2012

Consiglio di Stato, sezione III, sentenza no. 3306 of 5 June 2012

TAR Trieste, sentenza no. 418 of 15 November 2012

TAR Firenze, sezione II, sentenza no. 967 of 6 December 2012

Corte di Cassazione Penale, sezione III, sentenza of 8 November 2013 n. 45179

b. Spanish case law

Tribunal Constitucional (Sala Primera), sentencia no. 78 of 20 December 1982

Tribunal Constitucional (Sala Segunda), sentencia no. 107 of 23 November 1984

Tribunal Constitucional (Pleno), sentencia no. 28 of 14 February 1991

Tribunal Constitucional (Sala Primera), sentencia no. 64 of 22 March 1991

Tribunal Constitucional (Sala Primera), sentencia no. 242 of 20 July 1994

Tribunal Constitucional (Sala Segunda), sentencia no. 130 of 11 September 1995

Tribunal Constitucional (Sala Primera), sentencia no. 95 of 10 April 2000

Tribunal Superior de Justicia de Madrid, (Sala de lo Social, Sección 2ª), sentencia no. 880 of 27 December 2002

Tribunal Supremo (Sala 2ª, de lo Penal), sentencia no. 901 of 8 July 2004

Juzgado de lo Contencioso- Administrativo n. 1 de Vitoria-Gasteiz, sentencia no. 287 of 30 June 2006

Tribunal Constitucional (Pleno), sentencia no. 236 of 7 November 2007

Tribunal Superior de Justicia del País Vasco (Sala de lo Contencioso Administrativo), sentencia no. 237 of 19 April 2007

Tribunal Superior de Justicia de la Comunidad Valenciana (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 935 of 3 July 2008

Tribunal Superior de Justicia de Castilla Y León, Burgos (Sala de lo Contencioso Administrativo, Sección 1ª), sentencia no. 383 of 18 July 2008

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª), sentencia no. 617 of 6 October 2008

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª), sentencia no. 787 of 26 November 2008

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª), sentencia of 13 May 2009, application no. 262/08

Tribunal Superior de Justicia de Galicia (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 419 of 20 May 2009

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª), sentencia of 10 June 2009, application no. 272/08

Tribunal Superior de Justicia de Cataluña, (Sala de lo Social, Sección 1ª), sentencia no. 8133 of 10 November 2009

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 829 of 17 December 2009

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 848 of 28 December 2009

Audiencia Provincial de Madrid (Sección 27º), sentencia no. 395 of 4 March 2010

Tribunal Supremo (Sala 3ª, de lo Contencioso-Administrativo), sentencia of 1 June 2010, application no. 114/2007

Tribunal Superior de Justicia de Madrid, (Sala de lo Contencioso-Administrativo, Sección 9ª), sentencia no. 826 of 13 July 2010

Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 2199 of 8 October 2010

Audiencia Nacional (Sala de lo Contencioso-Administrativo, Sección 4ª), sentencia of 10 November 2011, application no. 396/2010

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 2ª), sentencia no. 86 of 2 February 2011

Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 1549 of 24 June 2011

Tribunal Superior de Justicia de la Comunidad Valenciana, (Sala de lo Contencioso-Administrativo, Sección 5ª), sentencia no. 823 of 22 November 2011

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 940 of 24 November 2011

Tribunal Superior de Justicia de la Comunidad Valenciana, (Sala de lo Contencioso-Administrativo, Sección 5ª), sentencia no. 874 of 12 December 2011

Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 1258 of 22 June 2012

Tribunal Superior de Justicia de Castilla y León, Valladolid (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 1273 of 29 June 2012

Audiencia Provincial de Madrid (Sección 27ª), sentencia no. 689 of 2 July 2012

Tribunal Superior de Justicia de Castilla Y León, Burgos (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 378 of 20 July 2012

Tribunal Superior de Justicia de Castilla y León, Burgos (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 388 of 27 July 2012

Tribunal Superior de Justicia de Andalucía, Granada (Sala de lo Contencioso-Administrativo, Sección 4ª), sentencia no. 2567 of 1 October 2012

Tribunal Superior de Justicia de Castilla-La Mancha (Sala de lo Contencioso-Administrativo, Sección 1ª), sentencia no. 252 of 26 November 2012

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 805 of 4 December 2012

Tribunal Superior de Justicia de Cataluña, (Sala de lo Social, Sección 1ª), sentencia no. 8384 of 12 December 2012

Tribunal Superior de Justicia de Andalucía, Sevilla (Sala de lo Social, Sección 1ª), sentencia no. 126 of 17 January 2013

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 235 of 9 April 2013

Tribunal Superior de Justicia de Islas Canarias, Las Palmas (Sala de lo Contencioso-Administrativo, Sección 2ª), sentencia no. 166 of 5 June 2013

Tribunal Superior de Justicia de País Vasco (Sala de lo Contencioso-Administrativo, Sección 3ª), sentencia no. 397 of 20 June 2013

Secondary Sources

a. Books, Book Chapters, Theses

Aja, E., ‘La Evolución de la Normativa Sobre Inmigración’, in Aja, E., Arango, J., (eds.), *Veinte Años de Inmigración en España: Perspectivas Jurídica y Sociológica (1985 -2004)*, Edicions Bellaterra, Barcelona, Spain, 2006

Anagnostou, D., ‘The Strasbourg Court, Democracy and the Protection of Marginalised Individuals and Minorities’, in Anagnostou, D., Psychogiopoulou, E., (eds.), *The European Court of Human Rights and the Rights of Marginalised Individuals and Minorities in National Context*, Martinus Nijhoff Publishers, Leiden; Boston, 2010

Arnadóttir, O. M., 'Multidimensional Equality from Within: Themes from the European Convention on Human Rights', in Schiek, D., and Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, New York, 2009

Ball, R., *The Legitimacy of the European Union Through Legal Rationality: Free Movement of Third Country Nationals*, Routledge, London, 2014

Barranco Avilés, M., *La Teoría Jurídica de los Derechos Fundamentales*, Editorial Dykinson, Madrid, Spain, 2004

Boaretto, M., *Ansia Prenatale nelle Donne Immigrate: Complicanze in Gravidanza, al Parto e Neonatali*, Ph.D. Thesis, Department of Neuroscience, Università degli Studi di Padova, 2010

Brillat, R., 'The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact', in De Búrca, G., de Witte, B., (eds.), *Social Rights in Europe*, Oxford University Press, Oxford, 2005.

Carles, I., Howard, E., Kofman, E., 'Gendered Experiences of Racial Discrimination: Comparative Socio-Legal Research', in Schiek, D., Lawson, A. (eds.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, Farnham, Surrey, United Kingdom, 2011

Conforti, B., *Diritto Internazionale*, Editoriale Scientifica, Napoli, Italy, 2006

Cook, R. J., and Cusack, S., *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, Philadelphia, 2011

Cook, R. J., 'Women's International Human Rights Law: The Way Forward', in Cook, R. J., (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 2011

Cornelisse, G., 'A New Articulation of Human Rights, or Why the European Court of Human Rights Should Think Beyond Westphalian Sovereignty', in Dembour, M., Kelly, T., (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, Abingdon, 2011

Díaz y García Conlledo, M., *Protección y Expulsión de Extranjeros en Derecho Penal*, La Ley, Madrid, Spain, 2007

Edwards, A., *Violence Against Women Under International Human Rights Law*, Cambridge University Press, Cambridge, 2011

García Cantero, G., 'Familia y Constitución', in García de Enterría, E., *El Desarrollo de la Constitución Española de 1978*, Libros Pórtico, Zaragoza, Spain, 1982

Gómez Fernandez, I., *Conflicto y Cooperación Entre la Constitución Española y el Derecho Internacional*, Tirant Lo Blanch, Valencia, Spain, 2005

González Enríquez, C., 'Spain', in Triandafyllidou, A., Gropas, R., (eds.), *European Immigration: A Sourcebook*, Ashgate, Aldershot, United Kingdom, 2007

Howard, E., *The EU Race Directive: Developing the Protection against Racial Discrimination within the EU*, Routledge, London, New York, 2010

Kesby, A., *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford University Press, Oxford, 2012

Kofman, E., 'Gendered Migrations, Livelihoods and Entitlements in European Welfare Regimes', in Piper, N. (ed.), *New Perspectives on Gender and Migration: Livelihoods, Rights and Entitlements*, Routledge, London, United Kingdom, 2008

Kofman, E., Roosblad, J., and Keuzenkamp S., 'Migrant and Minority Women, Inequalities and Discrimination in the Labour Market', in Kraal, K., Roosblad, J., and Wrench, J., *Equal Opportunities and Ethnic Inequalities in European Labour Markets: Discrimination, Gender and Politics of Diversity*, IMISCOE Reports, Amsterdam University Press, 2009

Konsta, A., 'Gender and "Plastic Citizenship" in European Social Law', in Moreau, M. (ed.), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* 129, Edward Elgar Publishing Limited, Cheltenham, United Kingdom, 2011

Lacey, N., 'Feminist Legal Theory and the Rights of Women', in Knop, K., (ed.), *Gender and Human Rights*, Oxford University Press, Oxford, New York, 2004

Lister, M., Pia, E., *Citizenship in Contemporary Europe*, Edinburgh University Press, Edinburgh, 2008

Lutz, H., 'When Home Becomes a Workplace: Domestic Work as an Ordinary Job in Germany?', in Lutz, H. (ed.), *Migration and Domestic Work : a European Perspective on a Global Theme*, Ashgate, Aldershot (UK) and Burlington (USA), 2008

Makkonen, T., 'Multiple, Compound and Intersectional Discrimination', in Lentin, A., (ed.), *Learning From Violence: the Youth Dimension*, Council of Europe, Strasbourg, 2003

Marrades Puig, A. I., *Luces Y Sombras del Derecho a la Maternidad: Análisis Jurídico de su Reconocimiento*, Valencia University, Spain, 2002

Martín Díaz, E., 'Mercado de Trabajo, Género e Inmigración', in VV.AA., *Mujeres Migrantes, Viajeras Incansables*, Harresiak Apurtuz, Bilbao, Spain, 2006

Marzal Yetano, E., *El proceso de constitucionalización del derecho de inmigración : estudio comparado de la reformulación de los derechos de los extranjeros por los tribunales de Alemania, Francia y España : derechos precarios y emergentes*, Colegio de Registradores de la Propiedad y Mercantiles de España, Madrid, Spain, 2009

Mestre i Mestre, R. M., 'Trabajadoras de Cuidado: Las Mujeres de Ley de Extranjería', in Checa, F., *Mujeres en el Camino: el Fenómeno de la Migración Femenina en España*, Icaria Editorial, Barcelona, Spain, 2005

Miranda, A., *Migrare al Femminile : Appartenenza di Genere e Situazioni Migratorie in Movimento*, McGraw-Hill, Milano, Italy, 2008

Muir, E., 'The European Court of Justice: a Fundamental Rights Institution Among Others', in Dawson, D., de Witte, B., Muir, E., (eds.), *Judicial Activism at the European Court of Justice*, Edward Elgar Publishing, 2013

Naldi, E., 'All'Incrocio di Fattori di Genere e Altri Fattori di Discriminazione', in Pezzini, B., (ed.), *Genere e Diritto: Come il Genere Costruisce il Diritto e il Diritto Costruisce il Genere*, Bergamo University Press, Bergamo, Italy, 2012

Nielsen, R., 'Is European Union Equality Law Capable of Addressing Multiple and Intersectional Discrimination Yet? Precautions Against Neglecting Intersectional Cases', in Schiek, D., Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, New York, 2009

Otto, D., 'Women's Rights', in Moeckli, D., Shah, S., Sivakumaran, S., (eds.), *International Human Rights Law*, Oxford University Press, Oxford, 2010

Ozyegin, G., Hondagneu-Sotelo, P., 'Conclusion: Domestic Work, Migration and the New Gender Order in Contemporary Europe', in Lutz, H., (ed.), *Migration and Domestic Work: A European Perspective on a Global Theme*, Ashgate, Aldershot (UK) and Burlington (USA), 2008

Perassi, T., 'La Costituzione Italiana e l'Ordinamento Internazionale', in *Scritti Giuridici*, Giuffr , Milano, Italy, 1958

Peroni, C., *Violenza di Genere e Neofemminismi: Discorsi e Pratiche*, Ph.D. Thesis, Department of Ecclesiastical, Philosophical-Sociological and Criminal Legal Sciences, University of Milan, 2012

Pezzini, B., 'La Struttura di Genere della Famiglia nella Giurisprudenza Costituzionale', in Pezzini B., (ed.), *Genere e Diritto: Come il Genere Costruisce il Diritto e il Diritto Costruisce il Genere*, Bergamo University Press, Bergamo, Italy, 2012

Ryan, B., *Labour Migration and Employment Rights*, Institute of Employment Rights, 2005

Rodríguez, C. M., Rubio Marín, R., 'The Constitutional Status of Irregular Migrants: Testing the Boundaries of Human Rights Protection in Spain and the United States', Dembour, M., Kelly, T., (eds.), *Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States*, Routledge, Abingdon, 2011.

Rodríguez Yagüe, C., 'Mujer, Inmigrante, Irregular: Otras Víctimas Escondidas de la Violencia de Género', in De La Sierra, S., Ortiz Pradillo, J. C., (eds.), *El Derecho y la Economía Ante las Mujeres y la Igualdad de Género*, Lex Nova, Valladolid, Spain, 2012

Rubio Marin, R., 'Integration in Immigrant Europe: Human Rights at a Crossroads', in Rubio Marin, R., (ed.), *Human Rights and Immigration*, Oxford University Press, Oxford, 2014

Saiz Arnaiz, A., *La Apertura Constitucional al Derecho Internacional y Europeo de los Derechos Humanos: el Artículo 10.2 de la Constitución Española*, Consejo General del Poder Judicial, Madrid, Spain, 1999

Schiek, D., 'From European Union Non-Discrimination Law Towards Multidimensional Equality Law for Europe', in Schiek, D., Chege, V., *European Union Non-Discrimination Law: Comparative Perspectives on Multidimensional Equality Law*, Routledge-Cavendish, London, New York, 2009

Schiek, D., Mulder, J., 'Intersectionality in EU Law: A Critical Re-Appraisal', in Schiek, D., Lawson, A. (eds.), *European Union Non-Discrimination Law and Intersectionality: Investigating the Triangle of Racial, Gender and Disability Discrimination*, Ashgate, Fernham, Surrey, United Kingdom, 2011

Sciortino, G., 'Immigration in Italy: Subverting the Logic of Welfare Reform?', in Jurado, E., (ed.), *Europe's Immigration Challenge: Reconciling Work, Welfare and Mobility*, I.B. Tauris, London, 2013

Soysal, Y. N., *Limits of Citizenship: Migrants and Postnational Membership in Europe*, University of Chicago Press, Chicago; London, 1994

Soysal, Y. N., 'Post-National Citizenship: Rights and Obligations of Individuality', in Amenta, E., Nash, K., Scott, A., *The Wiley-Blackwell Companion to Political Sociology*, Wiley-Blackwell, Chichester, Malden, 2012

Valdúeza Blanco, M. D., *El Tratamiento Jurídico del Trabajo de los Extranjeros en España*, Lex Nova, Valladolid, Spain, 2008

Vela Díaz, R., *Empleo, Trabajo y Protección Social de las Mujeres Extranjeras en España: Un Enfoque De Género de la Política Migratoria*, Doctoral Thesis, Faculty of Social and Legal Sciences at the Jaén University, 2013

Wiesbrock, A., *Legal Migration to the European Union*, Martinus Nijhoff Publishers, Leiden, the Netherlands, 2010

b. Journal Articles, Conference Papers, Working Papers

Ackers, L., 'Citizenship, Migration and the Valuation of Care in the European Union', 30(2) *Journal of Ethnic and Migration Studies* (2004) 373

Albin, E., Mantouvalou, V., 'The ILO Convention on Domestic Workers: From the Shadows to the Light', 41 (1) *Industrial Law Journal* (2012) 67

Almendros González, M. A., 'La mujer Extranjera Trabajadora Víctima de Violencia de Género', in García Castaño, F. J., Kressova, N., (eds.), *Actas del I Congreso Internacional Sobre Migraciones en Andalucía*, Instituto de Migraciones, Granada, Spain, 2011

Anderson, B., 'A Very Private Business: Exploring the Demand for Migrant Domestic Workers', 14(3) *European Journal of Women's Studies* (2007) 247

Anderson, B., 'Migrants and Work-Related Rights', 22 (2) *Ethics & International Affairs* (2008) 199

Askola, H., 'Violence Against Women, Trafficking, and Migration in the European Union', 13 *European Law Journal* (2007) 204

Askola, H., "'Illegal Migrants', Gender and Vulnerability: The Case of the EU's Returns Directive', 18 *Feminist Legal Studies* (2010) 159

Askola, H., 'Tale of Two Citizenships? Citizenship, Migration and Care in the European Union', 21(3) *Social and Legal Studies* (2012) 341

Battjes, H., Dembour, M., de Hart B., Farahat, A., Spijkerboer, T., Van Walsum, S., 'The European Court of Human Rights and Immigration: Limits and Possibilities', 11(3) *European Journal of Migration and Law* (2009) 199

Bell, M., 'Civic Citizenship and Migrant Integration', 13 (2) *European Public Law* (2007) 311

Bernardi, F., Garrido, L., Miyar, M., 'The Recent Fast Upsurge of Immigrants in Spain and Their Employment Patterns and Occupational Attainment', 49(1) *International Migration* (2011) 148

Bonetti, P. (ed.), 'Osservatorio Italiano', 2 *Diritto, Immigrazione e Cittadinanza* (2007) 219

Bonetti, P., *La Giurisprudenza Costituzionale sui Diritti Fondamentali degli Stranieri e le Discriminazioni*, paper presented at the Conference *La Tutela del Migrante dalle Discriminazioni Fondate sulla Nazionalità e/o sul Fattore Etnico-Razziale* [Protection of Migrants from Discrimination on the Grounds of Nationality and/or Ehtnic-Racial Origin, ed.], Associazione Studi Giuridici sull'Immigrazione, Sassomarconi-Bologna, 22-24 September 2011

Calavita, K., 'Gender, Migration, and Law: Crossing Borders and Bridging Disciplines', 40 (1) *International Migration Review* (2006) 104

Carrera, S., de Somer, M., Petkova, B., 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice', *CEPS Papers in Liberty and Security in Europe*, Paper n. 49 (2012)

Cataldo, C., Geraci, S., Sisto, M. R., 'Bambini Immigrati: Tutela Legale e Politiche Socio-Sanitarie', 30 *Medico e Bambino* (2011) 306, available at http://www.medicoebambino.com/?id=1105_306.pdf_c [last accessed on 8 March 2014].

Catarino, C., 'Politiques Migratoires et Politiques d'Emploi: La Flexibilité Sexuée en Europe', 51 (2) *Cahiers du Genre* (2011) 93

Chaib, S., 'Femmes Immigrées et Travail Salarié', 16 *Les Cahiers du CEDREF* (2008) 209

Cholewinski, R., 'The Human and Labor Rights of Migrants: Visions of Equality', 22 *Georgetown Immigration Law Journal* (2007 -2008) 177

Crenshaw, K., 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum* (1989) 139

Crenshaw, K., 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color', 43 *Stanford Law Review* (1990-1991) 1241

Cuenca Gómez, P., 'La incidencia del Derecho Internacional de los Derechos Humanos en el Derecho Interno: la Interpretación del Artículo 10.2 de la Constitución Española', 12 *Revista de Estudios Jurídicos* (2012)

Cuenca Gómez, P., 'Mujer y Constitución: Los Derechos de la Mujer Antes y Después de la Constitución Española de 1978', 8 *Revista de Filosofía, Derecho Y Política* (2008) 73, available at <http://universitas.idhbc.es/numero8.htm> [last accessed on 3 January 2014]

De Búrca, G., 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *New York University Public Law and Legal Theory Working Papers*, Paper 420 (2013)

Fullin, G., Reyneri, E., 'Low Unemployment and Bad Jobs for New Immigrants in Italy', 49(1) *International Migration* (2011) 118

Gavidia Sánchez, J. V., 'Españoles/Extranjeros', 58(1) *Revista Española de Derecho Internacional* (2006) 61

Gerards, J., 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights', 13 *Human Rights Law Review* (2013) 99

Goldscheid, J., 'Domestic and Sexual Violence as Sex Discrimination: Comparing American and International Approaches', 28 *Thomas Jefferson Law Review*, (2005) 355

Grigolo, M., Hermanin, C., Möschel, M., 'Introduction: How Does Race 'Count' in Fighting Discrimination in Europe?', 34(10) *Ethnic and Racial Studies* (2011) 1635

Hublet, C., 'The Scope of Article 12 of the Treaty of the European Communities *vis-à-vis* Third-Country Nationals: Evolution at Last?', 15(6) *European Law Journal* (2009) 757

Jones, J., 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice', 33 *Liverpool Law Review* (2012) 281

Juliano Corregido, D., 'Género y Trayectorias Migratorias en Época de Crisis', 97(3) *Papers. Revista de Sociología* (2012) 523

Khachani, M., *L'Émigration au Féminin: Tendances Récentes au Maroc*, CARIM Notes d'Analyses et de Synthèse 2009/26 – Module Démographique et Économique, Robert Schuman Centre for Advanced Studies, European University Institute, 2009

Kindler, M., 'The relationship to the Employer in Migrant's Eyes: the Domestic Work Ukrainian Migrant Women in Warsaw', 12 *Cahiers de l'URMIS* (2009)

Kofman, E., *Women Migrants and Refugees in the European Union*, paper presented at the Conference on the Economic and Social Aspects of Migration, jointly organized by the European Commission and the OECD, Brussels, 21-22 January 2003

Lamarque, E., 'L'Interpretazione Conforme al Diritto dell'Unione Europea Secondo la Corte Costituzionale Italiana', paper presented at *L'Interpretazione Conforme al Diritto UE: Profili e Limiti di un Vincolo Problematico* (Rovigo, 15- 16 May 2014), available at <http://www.giurcost.org/studi/lamarque3.pdf> [last accessed on 18 July 2014]

Lenzerini, F., 'International Legal Instruments on Human Trafficking and a Victim-Oriented Approach: Which Gaps Are to Be Filled?', 4 *Intercultural Human Rights Law Review* (2009) 205

Lewis, J., 'The Decline of the Male Breadwinner Model: the Implications for Work and Care', 8(2) *Social Politics* (2001) 152

Lewis, J., 'Gender and the Development of Welfare Regimes', 2(3) *Journal of European Social Policy* (1992) 159

Linos, K., 'Path Dependence in Discrimination Law: Employment Cases in the United States and the European Union', 35 *Yale Journal of International Law* (2010) 115

Lutz, H., Palenga-Möllenberg, E., 'Care, Gender and Migration: Towards a Theory of Transnational Domestic Work Migration in Europe', 19(3) *Journal of Contemporary European Studies* (2011) 349

Mantouvalou, V., 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation', 13(3) *Human Rights Law Review* (2013) 529

Mantouvalou, V., 'Are Labour Rights Human Rights?', 3(2) *European Labour Law Journal* (2012) 151

Mantouvalou, V., 'Servitude and Forced Labour in the 21st Century: the Human Rights of Domestic Workers', 35(4) *Industrial Law Journal* (2006) 395

Matsuda, M., 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method', 11 *Women's Rights Law Reporter* (1989)

McQuigg, R., 'Domestic Violence and the ECJ: Joined Cases C-483/09 and C-1/10 *Magatte Gueye and Valentín Salmerón Sánchez*', 18(4) *European Public Law* (2012) 645

Mella Méndez, L., 'El Tratamiento de la Víctima de Violencia de Género en la Normativa Española de Extranjería', 1(1) *Revista Internacional y Comparada de Relaciones Laborales y Derecho del Empleo* (January-March 2013) 1

Minow, M., Spelman, E. V., 'In Context', 63 *Southern California Law Review* (1990) 1597

Miranda, A., *et al.*, 'Les Mobilisations des Migrants: un Processus d'Émancipation Invisible ?', 51 *Cahiers du Genre* (2011/2012) 5

Miranda, A., 'Une Frontière Dans l'Intimité: la Confrontation Culturelle Entre Femmes Étrangères et Femmes Autochtones Dans l'Espace Domestique', 12 *Les Cahiers du CEDREF* (2004) 115

Morano-Foadi, S., Andreadakis, S., 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: the ECJ and ECtHR Jurisprudence', 22(4) *The European Journal of International Law* (2011) 1071

Mullally, S., Murphy, C., *Migrant Domestic Workers: Exclusions, Exemptions and Rights*, paper presented at the Migration Working Group event on *Migrant Domestic Workers, Care and Relational Rights: Exploring the Limits of Human Rights Norms*, European University Institute, 24 October 2012

Parella Rubio, S., 'Immigrant Women in Paid Domestic Service. The Case of Spain and Italy', 9(3) *Transfer: European Review of Labour and Research* (2003) 503

Parella, S., Samper, S., 'Factores Explicativos de los Discursos y Estrategias de Conciliación del Ámbito Laboral y Familiar de las Mujeres Inmigradas No Comunitarias en España', 85 *Papers. Revista de Sociología* (2007) 157

Parella, S., Petroff, A., Solé, C., 'The Upward Occupational Mobility of Immigrant Women in Spain', 39(9) *Journal of Ethnic and Migration Studies* (2013) 1365

Pérez, M., 'Emergency Frames: Gender violence and Immigration Status in Spain', 18(2) *Feminist Economics* 265 (2012)

Pérez Tremps, P., 'Constitución Española y Unión Europea', 71 *Revista Española de Derecho Constitucional* (2004) 103

Oso, L., Catarino, C., 'From Sex to Gender: The Feminisation of Migration and Labour-Market Insertion in Spain and Portugal', 39(4) *Journal of Ethnic and Migration Studies* (2013) 625

Randazzo, B., 'Il Giudizio Dinanzi alla Corte Europea dei Diritti: Un Nuovo Processo Costituzionale', 4 *Rivista dell'Associazione Italiana dei Costituzionalisti* (2011), available at <http://www.associazionedeicostituzionalisti.it/articolorivista/il-giudizio-dinanzi-alla-corte-europea-dei-diritti-un-nuovo-processo-costituzionale> [last accessed on 18 July 2014]

Roca i Girona, J., Soronellas Masdeu, M., Bodoque Puerta, Y., 'Migraciones Por Amor: Diversidad y Complejidad de las Migraciones de Mujeres', 97(3) *Papers: Revista de Sociologia* (2012) 285

Rubio Arribas, F. J., 'Aspecto Colateral del Desempleo: la "Xenofobia Laboral"', 28(4) *Nómadas. Revista Crítica de Ciencias Sociales y Jurídicas* (2010) 5

Satterthwaite, M., 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers', 8 *Yale Human Rights & Development Law Journal* (2005) 1

Strasser, E., Kraler, A., Bonjour, S., Bilger, V., 'Doing Family', 14(2) *The History of Family* (2009) 165

Torres Pérez, A., 'The Judicial Impact of European Law in Spain: ECHR and EU Law Compared', 30(1) *Yearbook of European Law* (2011) 159

Uriarte Torrealday, R., 'El Derecho al Trabajo y los Extranjeros Irregulares', 78 *Revista de Derecho Político* 257 (2010)

Varela Suanzes-Carpegna, J., 'La Constitución de 1978 en la Historia Constitucional Española', 69 *Revista Española de Derecho Constitucional* (2003) 31

Vari, F., 'A (Ben) Cinque Anni dalle Sentenze Gemelle, (Appunti su) Due Problemi Ancora Irrisolti', 18 *Federalismi.it* (2012), available at [http://federalismi.it/AppI MostraDoc.cfm?Artid=20866&content=A+\(ben\)+cinque+anni+dalle+sentenze+gemelle,+\(appunti+su\)+due+problemi+ancora+irrisolti&content_author=Filippo+Vari#.U8ko7vnUYdd](http://federalismi.it/AppI MostraDoc.cfm?Artid=20866&content=A+(ben)+cinque+anni+dalle+sentenze+gemelle,+(appunti+su)+due+problemi+ancora+irrisolti&content_author=Filippo+Vari#.U8ko7vnUYdd) [last accessed on 18 July 2014]

Van Walsum, S., 'Against All Odds: How Single and Divorced Migrant Mothers were Eventually able to Claim their Right to Respect for Family Life', 11 *European Journal of Migration and Law* (2009) 295

Vidal, E., Vono, D., 'La Inserción Laboral de las Mujeres Inmigradas en el Mercado de Trabajo Español', 57(3) *Documents d'Anàlisi Geogràfica* (2011) 563

Von Bogdandy, A., Kottmann, M., Antpöhler, C., Dickschen, J., Hentrei, S., Smrkolj, M., 'Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States', 49 *Common Market Law Review* (2012) 489

Weiss, A., 'Transnational Families in Crisis: An Analysis of the Domestic Violence Rule in E.U. Free Movement Law', 30 *Michigan Journal of International Law* (2009) 841

Woodward, A., Howard, N., Wolffers, I., 'Health and Access to Care for Undocumented Migrants Living in the European Union: a Scoping Review', *Health Policy and Planning*, Advance Access published August 16, 2013, doi: 10.1093/heapol/czt061

c. Reports and Statistical Sources

Action for Global Health, *Addressing the Global Health Workforce Crisis: Challenges for France, Germany, Italy, Spain and the UK*, January 2011, p. 30, available at <http://www.hrhresourcecenter.org/node/3370> [last accessed on 13 July 2014]

Airaghi, G., Garavaglia, E., 'Donne Straniere, Famiglia e Lavoro: le Evidenze della Ricerca sul Campo', in Colasanto, M., Marcaletti, F., (eds.), *Famiglie Immigrate, Tempi di Vita e Tempi di Lavoro: la Conciliazione Come Questione Emergente– Rapporto 2011*, Fondazione ISMU, Milan, Italy, 2012

Campani, G., Chiappelli, T., Cabral, I., Manetti, A., *Mapping of Policies Affecting Female Migrants and Policy Analysis: the Italian Case*, Working Paper No. 6, Florence, Italy, December 2006

Caritas/Migrantes, Dossier Statistico Immigrazione, 21st Report, 2011

Caritas/Migrantes, Dossier Statistico Immigrazione, 22nd Report, 2012

European Network of Legal Experts in the Field of Gender Equality, *The Transposition of Recast Directive 2006/54/EC*, European Commission, 2009, available at http://ec.europa.eu/justice/gender-equality/files/2009reportrecastdirectivefinal_en.pdf [last accessed on 19 March 2014].

European Union Agency for Fundamental Rights (FRA), *Migrants, Minorities and Employment: Exclusion and Discrimination in the 27 Member States of the European Union, Update 2003- 2008*, Publication Office of the European Union, 2010

European Union Agency for Fundamental Rights (FRA), *European Union Minorities and Discrimination Survey - Data in Focus Report 5: Multiple Discrimination*, 2011

European Women's Lobby, *Equal Rights, Equal Voices: Migrant Women in the European Union*, 19-21 January 2007

Eurostat, *First permits by reason, age, sex and citizenship* (most recent data from 2012), available at <http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database> [last accessed on 12 June 2014]

Eurostat, *Migrants in Europe: A Statistical Portrait of the First and Second Generation*, Eurostat Statistical Books, 2011, available at http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-31-10-539/EN/KS-31-10-539-EN.PDF [last accessed on 14 April 2013]

Eurostat, *Migration and Migrant Population Statistics*, 2013, available at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Migration_and_migrant_population_statistics#Publications [last accessed on 27 December 2013]

Eurostat, *Overqualification Rate by Groups of Country of Birth, Age groups and Sex*, 2011, available at http://epp.eurostat.ec.europa.eu/portal/page/portal/employment_social_policy_equality/migrant_integration/indicators [last accessed on 19 April 2013]

Eurostat, *Population by Sex, Age Group and Citizenship*, 2013, available at http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/dataset?p_product_code=MIGR_POP1CTZ [last accessed on 2 April 2014]

González Ortega, S., *La Protección Social de los Trabajadores Extranjeros*, Ministerio de Trabajo y Asuntos Sociales, Gobierno de España, 2007

Instituto de la Mujer, *Macroencuesta de Violencia de Género 2011: principales resultados*, Ministerio de Sanidad, Servicios Sociales e Igualdad, 8 February 2012, p. 20 ff., available at http://www.lamoncloa.gob.es/nr/rdonlyres/0ada074d-526e-4da5-aa8a-6f6846fefbf7/192959/principales_resultados_macroencuesta_2011.pdf [last accessed on 30 December 2013]

International Labour Conference, Report I(B), *A Global Alliance Against Forced Labour*, 93rd Session 2005

International Labour Conference, Report IV, *Decent Work for Domestic Workers*, 99th Session, Geneva, 2010

International Labour Organization, *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*, International Labour Office, Geneva, Switzerland, 2013

Istituto Nazionale di Previdenza Sociale, *Un Fenomeno Complesso: il Lavoro Femminile Immigrato*, p. 30 ff., available at [http://www.inps.it/news/Il lavoro femminile immigrato.pdf](http://www.inps.it/news/Il_lavoro_femminile_immigrato.pdf) [last accessed on 13 July 2014]

Italian Platform *Lavori in Corsa: 30 Anni CEDAW, Rapporto Ombra in Merito allo Stato di Attuazione da parte dell'Italia della Convenzione ONU per l'Eliminazione di Ogni Forma di Discriminazione nei Confronti della Donna (CEDAW) in Riferimento al VI Rapporto Presentato dal Governo Italiano nel 2009*, June 2011

Kofman, E., Meetoo, V., 'Family Migration', in International Organization for Migration, *World Migration Report*, 2008

Kofman, E., Raghuram, P., 'Skilled Female Migrants in the Discourse of Labour Migration in Europe', in *Mobility & Inclusion: Managing Labour Migration in Europe*, Dossier, Heinrich BöllStiftung, April 2010, available at [http://www.migration-boell.de/downloads/migration/DOSSIER Mobility and Inclusion.pdf](http://www.migration-boell.de/downloads/migration/DOSSIER_Mobility_and_Inclusion.pdf) [last accessed 4 February 2013]

Kofman, E., Meetoo, V., 'Family Migration', in International Organization for Migration, *World Migration Report*, 2008

Kraler, A., *Civic Stratification, Gender and Family Migration Policies in Europe: Final Report*, International Centre for Migration Policy Development, Vienna, May 2010

Marcaletti, F., 'Genere, Lavoro e Redditi degli Immigrati a Partire dai Dati Orim e dalle Rilevazioni su Offerta e Domanda di Lavoro', in Colasanto, M., Marcaletti, F., (eds.), *Famiglie Immigrate, Tempi di Vita e Tempi di Lavoro: la Conciliazione Come Questione Emergente– Rapporto 2011*, Fondazione ISMU, Milan, Italy, 2012

Moreno-Fontes Chammartin, G., *Female Migrant Workers' Situation in the Labour Market*, Thematic Review Seminar of the European Employment Strategy, ILO's International Migration Programme, 2008

OECD-UNDESA, *World Migration in Figures: A Joint Contribution by UN-DESA and the OECD to the United Nations High-Level Dialogue on Migration and Development*, 3 -4 October 2013, p. 2, available at <http://www.oecd.org/els/mig/World-Migration-in-Figures.pdf> [last accessed on 2 April 2014]

Parliamentary Assembly of the Council of Europe, Committee on Equal Opportunities for Women and Men, Explanatory Memorandum Accompanying Report *on Migrant Women: At Particular Risk From Domestic Violence*, Doc. 11991, 15 July 2009

Parliamentary Assembly of the Council of Europe, Committee on Migration, Refugees and Population, Explanatory Memorandum Accompanying the Report on *Protecting Migrant Women in the Labour Market*, Doc. 12549, 24 March 2011

Piper, N., *Gender and Migration*, Paper Prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, 2005

Rubin, J., Rendall, M. S., Rabinovich, L., Tsang, F., Van Oranje-Nassau, C., Janta, B., *Migrant Women in the European Labour Force: Current Situation and Future Prospects*, RAND Corporation, European Commission, 2008